Supreme Court, U.S.
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No. 14-____

Supreme Court of the United States

RANDY WHITE, WARDEN,

Petitioner,

v.

ROGER L. WHEELER,

Respondent.

CAPITAL CASE

On Petition for Writ of Certiorari to the U. S. Court of Appeals for the Sixth Circuit

APPENDIX TO CERTIORARI PETITION

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROGER L. WHEELER,
Petitioner-Appellant,

THOMAS L. SIMPSON, Warden,
Respondent-Appellee.

No. 11-5707

Appeal from the United States District Court
for the Western District of Kentucky at Louisville
No. 3:09-CV-00336—Joseph H. McKinley, Jr., Chief District Judge.

Argued: October 1, 2014

Decided and Filed: February 20, 2015

Before: MERRITT, GRIFFIN, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Joseph T. Flood, SHELDON, FLOOD & HAYWOOD, PLC, Fairfax, Virginia, for Appellant. David W. Barr, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Joseph T. Flood, SHELDON, FLOOD & HAYWOOD, PLC, Fairfax, Virginia, David M. Barron, KENTUCKY DEPARTMENT OF PUBLIC

ADVOCACY, Frankfort, Kentucky, for Appellant. David W. Barr, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee.

MERRITT, J., delivered the opinion of the court in which WHITE, J., joined. GRIFFIN, J. (pp. 16–45), delivered a separate dissenting opinion.

OPINION

MERRITT, Circuit Judge. This death penalty case from the Kentucky courts arises from the brutal murder of two victims in October of 1997. For reasons explained below, we conclude that a writ of habeas corpus must be issued as to the death sentence because the Kentucky trial court erroneously struck from the jury a Mr. Kovatch, an eligible juror who may have been in favor of sparing the Petitioner's life. The state trial court, after a full examination of Mr. Kovatch at voir dire, found him not to be "problematic" as a juror but one who "could consider the entire range" of penalties. Then the next day the trial court excused him because the judge mistakenly remembered him saying he would not consider the death penalty. The issue is one of procedural fairness in administering the death penalty. As the Supreme Court has observed, to permit the for-cause exclusion of an otherwise-eligible juror "unnecessarily narrows the cross-section of venire members" required under the Sixth Amendment and " 'stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.' " *Gray v. Mississippi*, 481

U.S. 648, 658–59, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (*quoting Witherspoon v. Illinois*, 391 U.S. 510, 523, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)).

I. Factual and Procedural History

In 2001, a Kentucky state jury sentenced Roger Wheeler to death after convicting him of two counts of intentional murder. [1]On direct appeal, the Supreme Court of Kentucky affirmed Wheeler's convictions and sentence, making the following findings of fact:

> On October 2, 1997, Louisville police discovered the bodies of [Nigel Malone and Nairobi Warfield] in the apartment the victims shared. The male victim was found in a hallway near the bathroom. He had suffered nine stab wounds. Two stab wounds to the chest were considered the fatal wounds by the medical examiner. She described the crime scene as having blood spatters on the floor, walls, furniture and appliances. The medical examiner believed that the main struggle occurred in the kitchen and progressed to the hallway where the body of the male victim was found.
>
> The female victim died as a result of manual strangulation. The medical examiner testified

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[1]The jury recommended a death sentence for each conviction after finding one aggravating circumstance: Wheeler's acts fo killing were intentional and resulted in multiple deaths. *See* Ky. Rev. Ann. § 532.025(2)(a)(6).

that she believed the struggle between the female and her assailant occurred in the bedroom where she was found. The female victim had multiple abrasions on the left side of her neck and lacerations with a bruise on her mouth and several bruises on her lips. Her body was found in a seated position, leaning against a bedroom wall. She was covered with a blanket or quilt and a scissors was protruding from her neck. The medical testimony determined that she had been stabbed with the scissors after she was already dead. During the autopsy, the medical examiner discovered that the female victim was pregnant.

There was blood on the floors and walls in nearly every room in the apartment. Numerous blood samples were also collected at the scene and were subject to laboratory testing. No fingerprints were found on the scissors.

Wheeler denied killing the two victims but he changed his story on several occasions. Originally, he denied ever being inside of the apartment on the night the murders occurred but then later admitted being in the apartment on that night. He claimed that Nigel Malone was already stabbed, but that he did not see Nairobi Warfield. He also asserts that the assailant was already inside the apartment and he and that person fought which was why he was wounded.

Wheeler v. Commonwealth, 121 S.W.3d 173, 178 (Ky.2003) (*Wheeler I*). The Kentucky state courts subsequently denied Wheeler's petition for post-conviction relief. *See Wheeler v. Commonwealth*, No. 2006–SC–000901–MR, 2008 WL 5051579, at *11 (Ky. Nov. 26, 2008) (*Wheeler II*).

Wheeler filed the instant petition for a writ of habeas corpus in May of 2009. Overruling Wheeler's timely objections, the district court adopted the magistrate judge's report and granted summary judgment to the State on all claims. We ultimately certified twelve claims for appellate review. Of these claims, six concern Wheeler's conviction; the rest deal with the jury's imposition of the death penalty.

II. The Exclusion of Mr. Kovatch

The Kentucky trial judge struck Juror Kovatch from the jury even though he expressly stated that he could consider the full range of punishment—including the death penalty—after earlier expressing reservations and uncertainty about its wisdom. In reviewing his exclusion, the Supreme Court of Kentucky neither provided any details about Mr. Kovatch nor referred to Supreme Court case law on the subject. Instead, it simply stated that the trial judge "appropriately struck for cause those jurors that could not impose the death penalty." *Wheeler I*, 121 S.W.3d at 179.

The Kentucky trial judge conducted the initial voir dire of Mr. Kovatch before the lawyers examined him.

She inquired whether he could consider the entire range of penalties, specifically asking about "[twenty] years imprisonment" and "the death penalty." Voir Dire Tr. at 1. He replied he "probably" could consider the death penalty "after some deep reflection." *Id.* Mr. Kovatch further said that he had not "formed an opinion one way or the other" regarding the death penalty and noted that there were "arguments on both sides of . . . it." *Id.* at 2. Furthermore, he did not believe he had "any moral, religious, spiritual or personal beliefs that would keep [him] from considering the death penalty." *Id.*

The prosecutor's voir dire questioning explained that if the jury found the defendant guilty of two homicides, "the Judge, at that point, would give [the jury] a penalty range of [twenty] years all the way up to the death penalty and all the options in between." *Id.* at 6. Mr. Kovatch replied that he had never "been confronted with that situation" before and it was "difficult for [him] to judge how [he] would . . act." Id. The prosecutor then asked Mr. Kovatch if he was saying he was "not absolutely certain whether [he] could realistically consider [the death penalty]. . .." *Id.* at 7 (emphasis added). Mr. Kovatch acknowledged he was not "absolutely certain" by saying, "I think, I think that would be the most accurate way I could answer your question." *Id.*

Soon after, upon examination by defense counsel, Mr. Kovatch described the death penalty as "a very philosophical topic" and "a very difficult one." *Id.* at 8. He discussed getting older, understanding "a lot more

things about values and [ ] life itself." *Id.* He described himself as "a bit more contemplative on the issue of taking a life and whether or not we have the right to take that life." Id. He was then asked whether he felt he could "consider all of the options presented." *Id.* at 9. He responded, "I believe I can, sir." *Id.*

After the trial judge excused the jurors for the evening, the prosecution moved to excuse Mr. Kovatch for cause, claiming he gave "two inconsistent answers" because "he could not say whether he could realistically consider the death penalty or not." *Id.* at 9. The prosecutor suggested that the "gravamen of his testimony" provided grounds to strike him for cause under *Gall v. Parker*, 231 F.3d 265 (6th Cir.2000), as "a juror who can't say if he can give the death penalty." Voir Dire Tr. at 9-10.

Responding to the prosecution's motion, defense counsel highlighted Mr. Kovatch's answers to the judge indicating his ability to consider "all the penalty options." Counsel said he was "a man who has contemplated this issue" who "wants to be very honest and candid with the Court" despite having "some reservations about the death penalty." *Id.* The defense further argued (correctly) that nothing in the case law disqualifies a juror "because they . question some aspects of the death penalty or they consider it to be a serious matter, or they consider it to be something that . . calls into question [ ] issues of . life and how important it is." *Id.*

Responding immediately to the prosecutor's motion, the trial judge expressed her impression that Mr. Kovatch was "someone who would take this job very seriously and who had serious reservations about the death penalty." *Id.* at 12. She believed he was someone who "could consider the entire range" after her questioning and "didn't even see him as problematic when [she] got through with him." *Id.* The trial judge then took the motion under advisement.

The following morning, the trial judge struck Mr. Kovatch for cause, relying on an inaccurate paraphrase of the record suggesting that Mr. Kovatch "couldn't consider" the death penalty:

> [T]he Commonwealth moved to strike Mr. Kovatch because of his expressed concerns about considering the entire range. And when I went back and reviewed his entire testimony, [the prosecutor] concluded with saying, "Would it be accurate to say that *you couldn't, couldn't consider the entire range* ?" And his response is—I think was, "I think that would be pretty accurate." So I'm going to sustain that one too.

Id. at 14 (emphasis added). This description differed materially from the prosecutor's actual question: "And if I understand you correctly, you're . . . telling me that, at this point *you're not absolutely certain whether you could realistically consider it or not*? " *Id.* at 7 (emphasis original).

Mr. Kovatch agreed he did not know to an absolute certainty whether he could realistically consider the death penalty, but the court proceeded as if *he knew he could not*. Mr. Kovatch clearly stated he could consider the full range of penalties prescribed by Kentucky law, and before her subsequent mischaracterization of his answer, the trial judge observed that he could "consider the entire range" and should be viewed as a good juror who was not even "problematic."

Although Supreme Court precedent addressing the exclusion of venirepersons from death-penalty juries has evolved and been clarified, the Court has repeatedly held that a venireperson who has reservations about the death penalty cannot be excused for cause if he or she is able to follow the trial court's instructions and consider all penalties provided under the law. In *Witherspoon*, the first Supreme Court case in a line of cases addressing this issue, the Court held that the only venirepersons who may be excluded for cause are:

> [T]hose who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

391 U.S. at 522 n. 21, 88 S.Ct. 1770. In *Wainwright v. Witt*, the Court clarified *Witherspoon* as follows:

> That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with Witherspoon 's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.

469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (footnote omitted).

In subsequent cases, the Court again clarified its position by holding that a juror may not be excluded if, like Mr. Kovatch, he can set aside his doubts and consider the death penalty. In *Lockhart v. McCree*, Justice Rehnquist explained:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). And, in *Uttecht v. Brown*, the most recent Supreme Court decision to discuss the for-cause removal of death penalty sentencing-phase juror, the Court again reiterated that "[c]apital defendants have the right to be sentenced by an impartial jury," and, to this end, reaffirmed that "[t]he State may not infringe [the *Witt* right] by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties." 551 U.S. 1, 9, 22, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007).

Although *Uttecht* held that a trial judge's decision regarding for-cause removals should be afforded great deference, *id.* at 17–22, 127 S.Ct. 2218, it also made clear that "[t]he need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decisions where the record discloses no basis for a finding of substantial impairment," *id.* at 20, 127 S.Ct. 2218. In *Uttecht*, the deference owed to the trial judge was largely premised on the trial judge's ability to "observe the demeanor of [the juror during *voir dire*]," and the defense's decision not to object when, after voir dire had concluded, the State challenged the juror for cause. *Id.* at 17–19, 127 S.Ct. 2218 ("The defense's volunteered comment that there was no objection is especially significant...."). Moreover, it was clear from the record that the juror "had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could

have prevented him from returning a death sentence under the facts of this case." *Id.* at 13, 127 S.Ct. 2218.

Here, Mr. Kovatch did not display a misunderstanding of his role as a potential juror or misstate the applicable law. He understood the decisions he would face and engaged with them in a thoughtful, honest, and conscientious manner. More important in the context of *Uttecht*, the trial judge's initial assessment of Mr. Kovatch's answers and demeanor reveals that she judged him as someone who "could consider the entire range" and "didn't even see him as problematic when [she] got through with him." [2] The trial judge reversed her initial assessment of Mr.

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[2]In responding to the State's challenge, the trial judge said:

> Well, um, my overall sense was that he was, uh, someone who would take this job very seriously and who had serious reservations about the death penalty, but his responses to my questions were not at all indicative of someone - uh, in fact, what I do when I finish my, my questioning is, is first of all, put down "could consider entire range" or "exhibits reluctance on death penalty" or "exhibits reluctance on 20 years" or "can't consider" - I do sort of a summary. Uh, and I put "could consider entire range." I mean, I didn't even see him as problematic when I got through with him. Um, I think if you look at the totality of the questioning, what he's indicating, uh, that I understood was that he would take it very seriously but that he could consider the entire range. Um, and

Kovatch's qualification, which was based on his demeanor and answers, after misapprehending a single question and answer exchange with the prosecutor. Had the trial judge properly processed that exchange, her initial belief that Mr. Kovatch was not "problematic" and "could consider the entire range" would have been confirmed. Thus, the deference owed to the trial judge's ability to assess Mr. Kovatch's demeanor supports that he was *Witt*—qualified to serve on Wheeler's jury.

Aware of the great deference owed a trial judge's decision to remove a potential juror for cause, we nevertheless find that the Kentucky court unreasonably applied clearly established Supreme Court law—namely, *Witt* and its progeny—when it held that Mr. Kovatch's removal for cause was constitutional.[3]

> I guess and, and maybe I just didn't hear it phrased the, the way that [the prosecution] phased it but, um, I didn't hear him say that he couldn't realistically consider the death penalty. Did he actually say that?

[3]We also observe that the trial judge's misapprehension of Mr. Kovatch's exchange with the prosecutor may itself warrant relief under 28 U.S.C § 2254(d)(2) because it led to a "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." We need not reach that question.

The Supreme Court has repeatedly made clear that the improper exclusion of a qualified juror in a death penalty case is presumed prejudicial. In *Gray*, it stated that it had "established a per se rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause." *Gray*, 481 U.S. at 659, 107 S.Ct. 2045 (citing *Davis v. Georgia*, 429 U.S. 122, 123–24, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976)). Thus, an improper for-cause exclusion of a prospective juror such as Mr. Kovatch is precisely the type of "structural error" [4] that the Supreme Court has said may not be excused through harmless-error analysis or on grounds of a lack of prejudice.

Since the *Lockhart* and *Gray* cases in 1986 and 1987, this has been the constitutional rule we must apply in all for-cause juror-exclusion cases. See, e.g., *Uttecht*, 551 U.S. at 22, 127 S.Ct. 2218 ("The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties."). The specificity and clarity of this rule also satisfies the AEDPA statutory requirement that a writ of habeas corpus may not be issued against a state-court judgment unless the state decision "was contrary to, or involved an unreasonable application of,

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[4]For a discussion of the "structural error" cases, including *Gray* case, see 3B Charles Alan Wright et al., *Federal Practice and Procedure* § 855 (4th ed. 2014).

clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[5]

Because we find that the trial court unconstitutionally excluded Mr. Kovatch from the jury warranting a new penalty-phase trial for Wheeler, we need not decide and therefore pretermit any other sentencing issues raised in his habeas petition. We will now turn to the issues raised by Wheeler concerning the guilt phase of his trial. We do not find that any of them warrant habeas relief.

III. Evidence of Victim's Pregnancy

Wheeler contends that the trial court denied him a fundamentally fair trial by admitting "irrelevant" evidence that the female victim, Nairobi Warfield, was pregnant at the time of her death. In the state appellate courts, Wheeler framed this issue primarily

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[5]AEDPA deference prevents federal habeas courts from upsetting many state court determinations. Under AEDPA, we may not grant a writ of habeas corpus unless the state court's adjudication of the claim was contrary to or an unreasonable application of federal law or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d). An unreasonable application of clearly established federal law occurs where a state court accurately identifies the governing legal rule but applies it in an unreasonable manner to the facts of the case before it. *Moore v. Berghuis*, 700 F.3d 822, 886 (6th Cir. 2012).

as a violation of Kentucky state law [6] as well as the Fourteenth Amendment of the United States Constitution. In this habeas appeal, he asserts that the allegedly improper admission of the evidence was so prejudicial as to render his entire trial fundamentally unfair.

There were only two references to Warfield's pregnancy at trial. [7] The Supreme Court of Kentucky held that this evidence was admissible and not prejudicial under Kentucky law, particularly in light of the "brief" role it played. *Wheeler I*, 121 S.W.3d at 181. Thus, this claim is not cognizable on federal habeas corpus review—at least to the extent that Wheeler claims its admission contravened Kentucky's laws or its rules of evidence. *See, e.g., Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir.2007) ("[E]rrors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus.").

Wheeler cites no Supreme Court decisions in which several brief references to the pregnancy of the murder victim, without more, have been held sufficiently

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[6]Wheeler argued that the admission of this evidence violated Kentucky Rule of Evidence 404(b) as well as Sections 2 and 11 of the Kentucky Constitution - which provide for a right to a fair trial.

[7]The medical examiner testified the autopsy revealed that Warfield was pregnant with a small embryo, and the prosecution also briefly mentioned the pregnancy during its closing argument. (R. 52, PID # 57).

egregious so as to violate the due process clause.[8] It stands to reason that a state court cannot rule contrary to established precedent when no such precedent exists. In short, Wheeler has failed to persuade us that the admission of evidence related to Warfield's pregnancy rendered his trial fundamentally unfair. Accordingly, no habeas relief is appropriate on this claim.

IV. Ineffective–Assistance–of–Counsel Claims

To demonstrate ineffective assistance of counsel, Wheeler must demonstrate that his trial "counsel's performance was deficient, and that the deficiency prejudiced his defense." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Moreover, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland 's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011).

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[8]Wheeler's brief relies heavily on the Fifth Circuit's opinion in *White v. Thaler*, 610 F. 3d 890 (5th Cir. 2010). This case does not entitle him to habeas relief. Even if we were to conclude that the Supreme Court of Kentucky's decision in this case was "contrary to" *White*, that case is not Supreme Court precedent as required by 28 U.S.C. § 2254(d)(1).

Wheeler raises three guilt-phase ineffective-assistance-of-counsel claims. We address each in turn.

A. Failure to Conduct an Adequate Investigation of Wheeler's Shoes

Police found several bloody shoe prints at the crime scene. In the middle of trial, Wheeler informed his trial counsel that he still possessed the gray Nike tennis shoes he claimed to have worn when he entered the victims' apartment on the night of the murders. Wheeler's trial counsel thus attempted to introduce these shoes for the jury to compare with the bloody shoeprints. The trial court, however, sustained the prosecution's objection and excluded the shoes on grounds of inadequate notice and lack of a chain of custody. The Supreme Court of Kentucky held that their exclusion was proper for a different reason: the shoes were irrelevant because Wheeler never testified that he was wearing them while he was inside the victims' apartment on the night of the murders. Rather, Wheeler testified on avowal only that he was wearing them the next day when he was arrested. Nor did the defense offer any other evidence to link the shoes to the crime scene. Thus, "[t]he mere fact that Wheeler owned a pair of shoes that may or may not have matched the shoe prints found at the crime scene did not tend to make the defense theory more probable." *Wheeler I*, 121 S.W.3d at 182.

In this habeas appeal, Wheeler argues that his trial counsel was ineffective for: (1) failing to elicit

testimony that his shoe size was larger than the prints found by police; (2) failing to lay a proper foundation for introducing the tennis shoes he claims he was wearing the night of the murders; and (3) failing to retain a shoeprint expert.

As an initial matter, Wheeler's claim that his trial counsel should have elicited testimony from him about his shoe size is procedurally defaulted. Wheeler did not present this claim to the state courts, and no state remedy now exists for doing so. *See Lovins v. Parker*, 712 F.3d 283, 293 (6th Cir.2013). Nor does Wheeler attempt to show cause and prejudice to cure the default. Accordingly, no relief is warranted.

Wheeler also faults his trial counsel for failing to elicit testimony as to whether he wore his tennis shoes on the night of the murders. The thrust of this argument is that admission of the tennis shoes would have corroborated Wheeler's testimony and thus enhanced his credibility—i.e., someone else must have committed the murders if the bloody footprints were not his. This line of reasoning omits a critical point: Wheeler cannot demonstrate prejudice without knowing the victims' shoe sizes. The bloody footprint may have belonged to one of them.

As for his claim regarding his trial counsel's failure to call a shoe expert, Wheeler asserted in his state post-conviction proceedings that had his tennis shoes been admitted into evidence, an expert would have been unnecessary for "jurors to compare the shoes with the shoe prints at the scene. A layperson could

determine this fact." *Wheeler II*, 2008 WL 5051579, at *6. The Supreme Court of Kentucky considered this admission "tantamount to a concession that lack of an expert was not ineffective assistance." *Id.* We agree. In light of these facts and the strength of the murder evidence, we cannot say that the Supreme Court of Kentucky unreasonably applied *Strickland* by holding that Wheeler was not prejudiced by the lack of a shoe expert.

B. Other Ineffective–Assistance–of–Counsel Claims

Wheeler claims that his trial counsel was constitutionally ineffective for failing to explain the presence of his blood on the female victim's thigh. He further argues that his trial counsel was ineffective for not sufficiently investigating or challenging the adequacy of the police techniques used to gather the blood evidence at the crime scene. The answer to these arguments is that there was simply no evidence his lawyer could use to rebut this evidence of guilt. Wheeler's brief cites neither any authority nor any portion of the record in support of this claim. Hence, this claim must be rejected.

Wheeler further contends that his trial counsel was ineffective for failing to call Earl Ricketts, Jr., to contradict the testimony of Denise Mumpfort. Mumpfort worked at a convenience store near the apartment where the murders occurred and testified that Wheeler had entered the store that night looking like someone had "poured [blood] on his head." Wheeler

claims that Ricketts, a security guard at the store, would have testified that Wheeler only had some blood on him "but not a lot." This proposed testimony would not have contradicted Mumpfort's in any material way. The mere presence of blood is all that mattered given Wheeler's testimony that he had been injured while fighting the alleged assailant who was armed with a knife. Trial counsel's decision not to call Ricketts was thus a question of tactics, and was not a significant mistake, if a mistake at all.

V. Prosecutorial Misconduct

Wheeler's first claim of misconduct involves the prosecutor's references to the shoeprint argument as a "defense trick" designed to distract the jury from more critical evidence.[9] The Kentucky trial court held that these statements were fair commentary on the defense's theory of the case— i.e., Wheeler's reliance upon supposed inconsistencies with various shoeprints. The Kentucky Supreme Court held that the prosecutor's comments did not deprive Wheeler of a fundamentally fair trial. *Wheeler I*, 121 S.W.3d at 189. Although the word "trick" can be viewed as unnecessarily pejorative, the comment was both isolated and responsive, and the Kentucky Supreme Court reasonably concluded that the comment did not

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[9]The prosecutor said: "So [the defense] gets up and said, 'Well, the shoeprint, that's the most telling of all.' Forget about all that DNA, forget about all the lies. It's called the defense trick. Look away, look away, look away. Don't look at the facts." PID 2053.

have an effect on Wheeler's due process right to a fair trial.

Wheeler also condemns the prosecutor's comments in closing concerning the unavailability of Wheeler's tennis shoes—evidence the prosecution itself had successfully convinced the trial court to exclude. Specifically, the prosecutor stated, "We need a shoe to compare [the bloody shoeprint] to. We don't have that. If you remember, [Wheeler] says, 'I had . . gray Nike tennis shoes, denim pants and a black or dark sweatshirt on.' He knows where his clothes are at. Mr. Cooperative never brought them in."[10] Wheeler argues

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[10]During closing argument, Wheeler's counsel focused on the shoeprint evidence several times, arguing: "Now when you go back to deliberate, I'm going to ask you to look very, very closely at the shoeprint evidence. . .. Please look very, very closely when you get back there. This shoeprint [lifted from the crime scene] and these shoeprints [lifted from a different area of the crime scene] don't match. There were obviously at least two other people in that home." PID 2014–42. Later, she suggested that a witness who was not called left the shoeprints: "Maybe they should have checked Shannon Calloway's shoe size. Maybe they should have compared Shannon Calloway's shoes to what they've got here." PID 2046. Again, "There had to be more than one person [in the home]. The shoeprint evidence tells you that." PID 2047. All of this appears to be support for the defense's ultimate conclusion that: "*Now if these shoeprints would have fit those of Roger Wheeler's, you would have heard that evidence. Those aren't Roger Wheeler's shoeprints.*" PID 2048.

Aware that the defense's closing argument revolved around the shoeprint evidence (or lack thereof), the prosecutor responded: "ETU [the state's evidentiary unit] does a good, thorough job [lifting the shoeprints]. . .. But you know what? We need a shoe to compare it to. We don't have that. If you remember, [Wheeler]

that this statement amounts to an improper attempt to shift the burden of proof onto him— i.e., he needed to produce his tennis shoes in order to establish his innocence. The Kentucky trial court held that by previously mentioning the shoeprint evidence, Wheeler's trial counsel opened the door for the prosecution to discuss that topic. The Kentucky Supreme Court held that the argument did not render Wheeler's trial fundamentally unfair. *Wheeler I*, 121 S.W.3d at 189. This conclusion did not involve an unreasonable application of federal law.

Wheeler's final misconduct argument concerns the prosecutor's statements regarding Shannon Calloway, a witness who discovered the victims' bodies and later

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says, 'I had gray Nike Airs or gray Nike tennis shoes, denim pants, and a black or dark sweatshirt on.' He knows where his clothes are at. Mr. Cooperative never brought [the shoes] in." PID 2051–52.

The trial judge overruled the defense's objection to this statement. Out of the presence of the jury, the trial judge first commented that the defense had tried to introduce the shoes only after trial had started (and thus the evidence was untimely). The trial judge then stated: "I do think it's fair for [the prosecutor] to comment on the fact that [the defense] focused greatly on the shoeprint [evidence] . . where that could have been pursued and it wasn't." PID 5052–53.

Regarding use of "Mr. Cooperative," the prosecutor made clear that "[the defense attorneys] keep hammering on how cooperative [Wheeler] was [when approached by police prior to being arrested], and that's why I'm making the statement if he was so cooperative, then why didn't he bring [the shoes] in, too?" PID 2053. The trial judge responded that she understood the prosecutor's reasoning and did not suggest it was improper.

accused Wheeler of being the perpetrator. Unbeknownst to the jury, Calloway died before trial in an unrelated incident. In final arguments, however, the defense suggested that Calloway may have been the real murderer but never explained that he was dead. In response, the prosecutor's closing argument stated that it was "kind of difficult in the middle of trial to stand up and run out and find people that the Defense wants us to get up and start pointing fingers at." Wheeler contends that this argument was improper for suggesting that he had some duty to call Calloway or had something to hide by failing to call Calloway as a witness. Again, the Kentucky Supreme Court determined that the argument did not deprive Wheeler of a fundamentally fair trial, and this determination, too, was not unreasonable. It is clear from the record that the prosecutor's comments were made in response to Wheeler's trial counsel's intimations that Calloway was the real murderer.

VI. Requested Jury Instructions

Finally, Wheeler argues that the trial court's failure to instruct the jury on voluntary intoxication and extreme-emotional disturbance denied him a fundamentally fair trial and thus was contrary to, or an unreasonable application of, the Supreme Court's holding in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

In capital cases, *Beck* requires a jury be instructed on non-capital lesser-included offenses only if "the evidence would permit a jury rationally to find [the

defendant] guilty of the lesser offense and acquit him of the greater." *Id.* at 635, 100 S.Ct. 2382. Moreover, "due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982). Thus, we must consider the facts of the case and the criminal laws of the state to determine whether the requested instruction on a lesser-included offense is warranted. *See Smith v. Bradshaw*, 591 F.3d 517, 523–25 (6th Cir.2010).

To receive extreme-emotional-disturbance instructions under Kentucky law, a defendant must put forth evidence of a dramatic "triggering event" that created "temporary emotional disturbance that overwhelm [ed] the defendant's judgment." *Baze v. Parker*, 371 F.3d 310, 325 (6th Cir.2004) (citations omitted). Wheeler, however, has made no such showing. Neither his testimony nor any circumstantial evidence suggested any possible triggering event that would cause a mindless explosion of brutal violence. The Supreme Court of Kentucky thus reasonably found that Wheeler was not entitled to an extreme-emotional-disturbance instruction.

The same is true concerning the voluntary-intoxication instruction. Under Kentucky law, this instruction is warranted only where the evidence sufficiently indicates a voluntary intoxication so severe that the defendant not only could not form the intent to kill, but also did not know what he or she was doing at the time. *Harris v. Commonwealth*, 313

S.W.3d 40, 50–51 (Ky.2010) (citation omitted). Although Wheeler had undoubtedly been drinking and smoking crack cocaine the night of the murders, the record presents no evidence suggesting that he was so intoxicated that he could not conform his conduct to the law. Indeed, Wheeler's testimony as to his actions later that evening confirmed that he was well aware of events around him and acting of his own volition. Again, the Supreme Court of Kentucky reasonably reached this exact conclusion in accordance with the *Beck* standard.

VII. Conclusion

For the foregoing reasons, we hold that Wheeler is entitled to habeas relief as to his death sentence only. The judgment of the District Court is affirmed as to the guilt phase of the state trial. Contrary to our dissenting colleague's view, however, AEDPA does not protect an inconsistent ruling by the state trial judge based on a mistaken memory of a juror's earlier voir dire testimony. The judgment, therefore, is reversed as to the death sentence, and the case is remanded with instructions to issue the writ of habeas corpus.

DISSENT

GRIFFIN, Circuit Judge, dissenting. Petitioner Roger Wheeler, a Kentucky death row inmate, appeals a federal district court order denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court granted a certificate of appealability (COA) on ten claims, and we certified two additional

claims. Unlike the majority, I conclude that petitioner is not entitled to habeas relief on any of his claims. Thus, I respectfully dissent.

I.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits federal habeas review of state court proceedings and provides that an application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court adjudication is "contrary to" Supreme Court precedent under § 2254(d)(1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law[,]" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court

precedent and arrives at [an opposite result]." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under the "unreasonable application" clause of § 2254(d)(1), habeas relief is available if "the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case[.]" *Harris v. Haeberlin*, 526 F.3d 903, 909 (6th Cir.2008) (citations and internal quotation marks omitted). "In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous," but rather "must have been 'objectively unreasonable.' " *Wiggins v. Smith*, 539 U.S. 510, 520–21, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citations omitted). That means

> even clear error will not suffice. Rather, as a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

White v. Woodall, —— U.S. ——, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014) (emphasis added, citations, quotation marks, and alterations omitted). In short, the standard for obtaining federal habeas relief is "difficult to meet." *Id.* (citation omitted).

In the present case, the Kentucky state trial court dismissed for cause a potential juror because he equivocated in his responses at voir dire, claiming to be able to apply the death penalty, while at the same time expressing reservations about his ability to do so. The state trial court ultimately found that Mr. Kovatch was impermissibly biased because he "expressed concerns about considering" the death penalty as a sentencing option and dismissed him for cause. Because the state trial court's decision was neither an unreasonable determination of the facts nor an "error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *White*, 134 S.Ct. at 1702, petitioner is not entitled to habeas relief on this issue.

II.

A.

First, petitioner Wheeler argues that the trial court's decision to dismiss Mr. Kovatch was based on an unreasonable determination of the facts, thus violating § 2254(d)(2). A trial court's finding regarding a juror's bias is a finding of fact. *Bowling v. Parker*, 344 F.3d 487, 519 (6th Cir.2003) (citing *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)). In addition to § 2254(d)(2), § 2254(e)(1) applies to our review of a state court's factual determinations. Taken together, these provisions embody the principle that, on habeas review, federal courts must afford substantial deference to the factual findings of a state court.

The Supreme Court has explained:

> AEDPA instructs that, when a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn the state court's decision only if it was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The prisoner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." § 2254(e)(1). We have not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1), and we need not do so here. *See Wood v. Allen*, 558 U.S. 290, 293, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). For present purposes, it is enough to reiterate "that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Id.*, at 301, 130 S.Ct. 841.

Burt v. Titlow, —— U.S. ——, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013).

Petitioner argues that deference to the state trial court's findings of fact is not warranted because the court misread the voir dire testimony related to Mr. Kovatch. In other words, petitioner argues that the transcript itself is conclusive proof that the state trial court's conclusion about Mr. Kovatch's bias was an unreasonable determination of the facts. I disagree.

When questioned by the trial court about whether he could consider the death penalty, Mr. Kovatch replied, "[p]robably with some deep reflection." When the state judge asked him about his beliefs about the death penalty, Mr. Kovatch replied that he believed there were "arguments on both sides" of the issue and that he had not "formed an opinion one way or the other." The court then asked Mr. Kovatch whether he was a member of any religious or spiritual group that had an opinion concerning the death penalty; he responded that "[i]t is a topic of discussion" within that context. The prosecutor asked Mr. Kovatch if his position was that he was not "absolutely certain whether [he] could realistically consider" the death penalty, and Mr. Kovatch replied "that would be the most accurate way" to describe his position on the death penalty. Later, during questioning by defense counsel, Mr. Kovatch expressed his views on the death penalty as follows:

> [It is] a very philosophical topic. I think a very difficult one. Um, the older I get, uh, perhaps the more I understand, uh, a lot more things about values and life itself. I have four children, and those things are important to me. So, uh, perhaps I'm a bit more contemplative on the issue of taking a life and, uh, whether or not we have the right to take that life.

However, Mr. Kovatch later indicated that he would be able to consider "all of the [sentencing] options presented."

The prosecutor moved to strike Mr. Kovatch for cause, arguing that he had given inconsistent answers regarding his ability to consider the death penalty. Defense counsel opposed the motion, arguing that "in the totality of his answers, clearly we've got an individual who has some reservations about the death penalty" but still argued that Mr. Kovatch could consider the death penalty as an option. The state trial judge ultimately agreed with the prosecutor that Mr. Kovatch was impermissibly biased and dismissed him for cause.

Based on this record, petitioner has not met his burden to overcome the presumption of correctness afforded to the state trial court's fact-finding. The record regarding Mr. Kovatch is substantially similar to that in *Jackson v. Houk*, 687 F.3d 723, 739–40 (6th Cir.2012), cert. denied, —— U.S. ——, 133 S.Ct. 1243, 185 L.Ed.2d 190. In Jackson, this court did not disregard the AEDPA deference afforded to the state court's factual findings, even though the record showed that a prospective juror was "equivocal in her responses" to questions about whether she could apply the death penalty. *Id.* at 739. Just as Mr. Kovatch in this case opined that he was "not certain" that he could apply the death penalty, and that he was "contemplative" as to whether "we have the right to take [a] life[,]" Juror 301 in Jackson indicated she "didn't know" whether she could apply the death penalty. *Id.* at 740 (alteration omitted). Just as Mr. Kovatch here opined that he could consider all the sentencing options presented, Juror 301 in Jackson indicated unambiguously that she would "fairly

consider" the death penalty, despite her reservations, and "would try" to apply it. *Id.* Thus, in Jackson, as here, a juror expressed doubts about the wisdom of the death penalty yet also equivocated, claiming to be able to apply it fairly. In both cases, the juror was struck for cause. Jackson relied on the deference owed to the state trial court in affirming. *Id.* Under the principles of deference embodied by §§ 2254(d)(2) and (e)(1), this case warrants the same result.

This result makes sense, moreover, given the nature of the burdens imposed by AEDPA. Again, under §§ 2254(d)(2) and (e)(1), this court must defer to the state trial court's finding that Mr. Kovatch was biased. *See Burt*, 134 S.Ct. at 15. And, again, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood*, 558 U.S. at 301, 130 S.Ct. 841. In other words, if reasonable minds could differ about the correctness of the state trial court's fact-finding, its factual determinations are not unreasonable under § 2254(d)(2). Here, reasonable minds could readily differ because Mr. Kovatch equivocated in his answers about his ability to apply the death penalty.

Petitioner also claims he is entitled to relief under § 2254(d)(2) for a reason left unaddressed by the majority: that because a video record of the trial exists in this case, deference to the trial court is improper, and we may review de novo the facts surrounding Mr. Kovatch's selection. This novel argument is meritless. First, petitioner cites no authority for the proposition

that AEDPA deference is not warranted where there is a video record of trial, and it is well-settled that "conclusory argument[s]" made "without any further discussion or citation to authority [are] waived on appeal." *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 441 (6th Cir.2002) (citation omitted). Second, and critically, petitioner's argument is essentially an argument that we ignore the express will of Congress, which twice in AEDPA explicitly codified the deference owed to trial courts' findings of fact. *See* 28 U.S.C. §§ 2254(d)(2), (e)(1). The Supreme Court has recognized as much, explaining that AEDPA "provide[s] binding[ ] directions to accord deference." *Uttecht v. Brown*, 551 U.S. 1, 10, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). Neither the Supreme Court nor Congress has provided an exception to AEDPA's factual deference for cases in which a video record of the trial exists.

For these reasons, I would deny petitioner's claim that he is entitled to habeas relief under § 2254(d)(2).

B.

Next, petitioner Wheeler claims that he is entitled to habeas relief under § 2254(d)(1) because Mr. Kovatch's dismissal was "contrary to, or involved an unreasonable application of, clearly established federal law." Unlike the majority opinion, I conclude that petitioner is not entitled to habeas relief on this claim.

For-cause dismissals in death penalty cases are governed principally by *Wainwright v. Witt*, 469 U.S.

412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Witt held that the standard for such dismissals is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 424, 105 S.Ct. 844 (citation and quotation marks omitted). The juror's impartiality need not be demonstrated with "unmistakable clarity" as "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Witt*, 469 U.S. at 424, 105 S.Ct. 844. Accordingly, "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law," despite a "lack of clarity" to this effect in the record. *Id.* at 425–26, 105 S.Ct. 844.

For precisely this reason, the Supreme Court held in *Uttecht*—the most recent case to address the issue of prospective juror dismissals—that deference to the trial court's determinations is required on habeas review in such cases. The Court explained that "[c]ourts reviewing claims of *Witherspoon–Witt* error especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror." *Uttecht*, 551 U.S. at 22, 127 S.Ct. 2218. Indeed, the trial court not only has an opportunity to "assess the demeanor of the venire and the individuals who compose it," which is of "critical importance in assessing the attitude and qualifications of potential jurors," it is also uniquely situated to assess "nonverbal communication"

occurring in the courtroom, *Id.* at 9–10, 127 S.Ct. 2218, and to make credibility determinations that appellate courts cannot. *See United States v. Gabrion*, 719 F.3d 511, 527 (6th Cir.2013) (en banc), *cert. denied*, —— U.S. ——, 134 S.Ct. 1934, 188 L.Ed.2d 963 (2014).

Thus, "the question [for a federal court on habeas review] *is not whether [the] reviewing court might disagree with the trial court's findings, but whether those findings are supported by the record.*" *Witt*, 469 U.S. at 434, 105 S.Ct. 844 (emphasis added). Because of the deference to which a trial court's finding is entitled, when there is "ambiguity" in the record as to a juror's response to voir dire questioning, "the trial court [is] entitled to resolve [that ambiguity] in favor of the State." *Id.*; *see also Uttecht*, 551 U.S. at 7, 127 S.Ct. 2218.

The majority opinion ignores these principles by asking not whether there is evidence in the record to support the trial judge's finding of substantial impairment [1]—which is what AEDPA requires—but

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[1]Petitioner asserts that the trial court did not apply *Witt's* substantial impairment standard when dismissing Mr. Kovatch, and at oral argument noted that Kentucky's standard for juror dismissal does not tract precisely with *Witt*. This is not a basis for relief. Ultimately, the trial court dismissed Mr. Kovatch because he equivocated in his answers regarding whether the could fairly apply the death penalty; this bias finding is a finding of substantial impairment under *Witt*, even if the trial court did not precisely quote *Witt's* language. *See Witt*, 469 U.S. at 425 - 26 (noting that there will be situations where a trial court is left with a definite impression that a juror is biased, despite a "lack of clarity" to that end in the record, and deference is appropriate in those situations).

instead whether, in its judgment, the court "properly processed [the] exchange" between Mr. Kovatch and the prosecutor. The proper inquiry is whether the state court's finding of substantial impairment is supported by the record, irrespective of whether we would reach a different result. *Witt*, 469 U.S. at 434, 105 S.Ct. 844.

Here, there is support in the record for the trial court's ruling. As previously detailed, Mr. Kovatch gave equivocal answers to questions about whether he could apply the death penalty. Contrary to the majority opinion's summary of the transcript, the evidence for Mr. Kovatch's equivocation is not derived from a "single question and answer exchange with the prosecutor." Quite the opposite: Mr. Kovatch agreed he was not "absolutely certain" whether he could apply the death penalty in response to a question from the prosecutor. But, during an interchange with petitioner's trial counsel, Mr. Kovatch expressed doubts about "whether or not we have the right to take [a] life." Even petitioner's trial counsel acknowledged that Mr. Kovatch had equivocated in his responses when counsel opposed the prosecution's motion to have Mr. Kovatch struck for cause. In light of the fact that the trial court was entitled to resolve Mr. Kovatch's equivocation in favor of dismissal for cause, see id., the grant of the petition for habeas corpus cannot be reconciled with AEDPA's requirement that a petitioner establish that the trial court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White*, 134 S.Ct. at 1702.

The majority opinion also relies on *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1986), for the proposition that the erroneous dismissal of a prospective juror in a death penalty case is a structural error not subject to harmless error review. Because I conclude that Mr. Kovatch's dismissal was not erroneous, I would not reach this issue. However, because the majority raises the issue, I briefly note my disagreement with its analysis.

The majority opinion's reliance on Gray is misplaced in light of *Uttecht*, which resolves the issue for the present case. The Supreme Court noted in *Uttecht* that *Gray* "represents a rare case" because "in the typical situation there will be a state-court finding of substantial impairment; in Gray, the state courts had found the opposite." *Uttecht*, 551 U.S. at 9, 127 S.Ct. 2218. Thus, *Uttecht* held, *Gray* "is of limited significance to the instant case" and others in which there has been a state-court finding of substantial impairment requiring deference under AEDPA. *Id.*

In *Gray*, the trial judge realized during the course of voir dire that he had mistakenly overruled a number of the prosecutor's challenges for cause for prospective jurors who were excludable under *Witherspoon*, the prevailing standard at the time. *Gray*, 481 U.S. at 651–66, 107 S.Ct. 2045. The fact that the trial judge erred in failing to dismiss the excludable jurors for cause forced the prosecution to use all of its peremptory challenges. Consequently, the prosecution asked for a dismissal of an additional prospective juror who had said she could "reach either a guilty or not guilty

verdict and that she could impose the death penalty if the verdict were guilty." *Id.* at 654, 107 S.Ct. 2045. The trial judge made no finding that the prospective juror was excludable and dismissed her as "a sort of 'make-up' for the challenges for cause the trial judge wrongfully denied." David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law, 59 La. L.Rev. 1105, 1138* (1999). No such circumstance exists here. Here, the trial judge found that Mr. Kovatch was impermissibly biased because he "expressed concerns about considering" the death penalty as a sentencing option. Thus, as in *Uttecht*, *Gray* is of "limited significance" [2] in

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[2]The majority opinion also paints an incomplete picture of the Supreme Court's harmless error doctrine in this context by failing to mention *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). *Ross*, decided only a year after *Gray*, cast doubt on *Gray* 's sweeping rationale. The *Ross* court noted that

> the statement that any error which affects the composition of the jury must result in reversal defies literal application. If, after realizing its error, the trial court in *Gray* had dismissed the entire venire and started anew, the composition of the jury would undoubtedly have been affected by the original error. But the *Gray* majority concedes that the trial court could have followed that course without risking reversal. *Id.* at 87 n.2, 108 S.Ct. 2273.

Indeed, there is reason to believe that

> the *Ross* Court largely overruled [*Gray*] by shifting the focus from the possible effect on the composition of the jury panel as a whole to the very narrow-and unlikely-to-arise-right of the

this case because, unlike in Gray, the trial court found Mr. Kovatch was substantially impaired. Under AEDPA, this court is required to defer to the state court's ruling unless it violated §§ 2254(d)(1) or (d)(2). And, for the reasons I outline above, it did not.

III.

Next, Wheeler appeals the trial court's admission of evidence that Warfield was pregnant at the time she was killed. On direct appeal in the state appellate courts, petitioner framed this issue primarily as a violation of Kentucky state law—petitioner argued that the admission of this evidence violated Kentucky Rule of Evidence 404(b); Sections 2 and 11 of the Kentucky Constitution, which provide for a right to a fair trial; and the Fourteenth Amendment of the Federal Constitution. The Kentucky Supreme Court concluded that the admission of the evidence was proper under

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> defendant to not have a death-qualified juror disqualified when it is clear that juror would have been impaneled because the prosecution was fresh out of peremptory challenges.

McCord, 59 La. L.Rev. at 1138. The ultimate issue is "whether the constitutional focus should be, as in *Gray*, on the composition of the jury panel as a whole, or as in *Ross*, on whether the jurors who were impaneled were qualified to sit." *Id.* And, because a qualified juror's exclusion from the venire tells us nothing about the qualifications of the jurors ultimately impaneled, "it seems hard to say that a defendant's death sentence is faulty when it was rendered by properly qualified jurors." *Id.* In any event, as noted above, Uttecht resolves the issue in this case.

Kentucky law and that "[t]he pregnancy of the female victim was not sensational or shocking or prejudicial or likely to induce any undue sympathy. The brief reference to her pregnancy was fair comment to explain her identity. It did not deprive [petitioner] of a fair trial." *Wheeler v. Commonwealth*, 121 S.W.3d 173, 181 (Ky.2003) (citation omitted).

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.* at 67–68, 112 S.Ct. 475. Thus, "errors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus." *Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir.2007) (citation and quotation marks omitted). Thus, to the extent that petitioner claims that the admission of evidence related to Warfield's pregnancy contravened Kentucky's laws or it rules of evidence, those claims are not cognizable on federal habeas corpus review.

However, where, as here, a habeas petitioner argues that the allegedly improper admission of evidence "was so prejudicial that its admission rendered his entire trial fundamentally unfair" under the Federal Constitution, we may address the claim as a federal due process claim where the state court's "prejudice inquiry . . . bears at least 'some similarity' to a determination" of the due process claim he raises in

his habeas petition. *Id.* at 519–20 (quoting *Maldonado v. Wilson*, 416 F.3d 470, 474 (6th Cir.2005)). Here, petitioner's due process claim bears "some similarity" to the state-law claim decided by the Kentucky Supreme Court. *Compare* Petitioner's Br. at 38–50, with *Wheeler*, 121 S.W.3d at 181. Accordingly, as in *Bey*, I review this claim under a "modified AEDPA standard, which requires us to conduct a careful review of the record and applicable law, but nonetheless bars us from reversing unless the state court's decision is contrary to or an *unreasonable application* of federal law, i.e., Supreme Court precedent." *Bey*, 500 F.3d at 520 (citation, quotation marks, and alterations omitted). And, because the Kentucky Supreme Court's "prejudice inquiry relied entirely on [Kentucky] law without any reference to federal law," this court "need not consider whether that decision resulted in an unreasonable application of federal law." *Bey*, 500 F.3d at 520. Rather, "[w]e need only look to the question of whether the [Kentucky] Supreme Court's decision is contrary to federal law." *Id.*

With this framework in mind, I turn to the evidence of Warfield's pregnancy. During pre-trial proceedings, petitioner's trial counsel moved to exclude evidence of Warfield's pregnancy as irrelevant under Kentucky Evidence Rule 401. In opposition, the prosecutor argued that the evidence should be admitted because it humanized the victim. Relying upon *Sanborn v. Commonwealth*, 754 S.W.2d 534, 542 (Ky.1988), and *McQueen v. Commonwealth*, 669 S.W.2d 519 (Ky. 1984), the trial court overruled petitioner's trial counsel's motion, but instructed the parties that

the evidence should not be "unduly emphasized" or used as a basis for argument. Petitioner's trial counsel asked the court to reconsider its ruling out of concern that a juror may have an emotional response to the evidence and subsequently consider the crime a triple homicide rather than a double homicide. The trial court re-affirmed its ruling.

At trial, during the prosecution's case-in-chief, the first reference to Warfield's pregnancy occurred during testimony by an assistant medical examiner for the Commonwealth of Kentucky, Amy Burrows, M.D., who performed the autopsy. Dr. Burrows testified that she discovered Warfield's pregnancy during the autopsy when she saw a "small embryo in an—in a little sac with a placenta." The trial court overruled petitioner's trial counsel's objection to that testimony.

A second reference to Warfield's pregnancy occurred at the close of the evidence for the guilt phase. In its closing argument, the prosecutor referred to Warfield's pregnancy in an effort to humanize her to the jury:

> And what about Nairobi? They didn't find drugs in her system. Nobody has ever said she was a drug dealer. What about her? What about her life? Autopsy told you (inaudible) she didn't have any alcohol in there. There's no drugs. She was pregnant. I mean, she's a normal person. She just loved a guy named Nigel. He

> loved her. They lived together in the west end, and they die [d] because of that. And we're supposed to believe that's okay.

Petitioner's trial counsel did not object.

Initially, petitioner argues that the above evidence was irrelevant because "[n]either Warfield nor [petitioner] knew Warfield was pregnant" and submits case law from state courts in Florida, Texas, Indiana, and Kansas in support of the proposition that where, as here, a victim is not visibly pregnant, evidence of her pregnancy is not relevant in a homicide case. However, the Kentucky Supreme Court, interpreting Kentucky law, has already held in this case that the evidence was admissible and not prejudicial, particularly in light of the "brief" role it played in the trial. *See Wheeler*, 121 S.W.3d at 181. And, in any event, these state-law decisions from other states do not establish that the Kentucky Supreme Court's decision in this case was contrary to clearly established *federal law*.

Petitioner does rely on one federal case, however: *White v. Thaler*, 610 F.3d 890 (5th Cir.2010). There, a Texas state jury convicted the petitioner, Wendell White, of the aggravated murder of Latasha Vasquez and the aggravated assault of Tracey Johnson after running over each of them with a pickup truck. *Id.* at 892. On appeal, White alleged, among other things, that trial counsel was ineffective for failing to object to the introduction of evidence of Vasquez's pregnancy. *Id.*

at 894. The Texas Court of Criminal Appeals (TCCA) and the federal district court rejected this claim. *Id.* at 894–95. The Fifth Circuit disagreed with the state and federal district courts, concluding that trial counsel's failure to object to such evidence constituted deficient performance because the evidence had "no probative value," Texas state law did not support the admission of the evidence, and trial counsel indicated that no strategy gave rise to their decision. *Id.* at 907-09.The Fifth Circuit determined that White suffered prejudice as a result because "the evidence that White intended to kill Vasquez pales in comparison to the evidence that White intended to run over Johnson." Id. at 912. The court further explained that the record belied the TCCA's characterization of the references to Vasquez's pregnancy as "brief," explaining:

> We do not necessarily agree with the TCCA's assessment that the testimony and argument with respect to the victim's pregnancy was "brief." Defense counsel brought up the victim's pregnancy twice during the direct examination of White and three times during closing argument. The prosecutor asked two questions regarding the fetus and referred to the unborn child twice during closing argument. In total, the jury was reminded nine times during the guilt-innocence phase that Vasquez's unborn child died as a result of White's actions. Further, the prosecutor's closing argument regarding the unborn child being killed as the victim was "dragged" and "crushed" by the truck was likely to appeal to the jury's emotions and encourage

> the jury to make its guilt-innocence decision on an emotional basis.

Id. at 911–12.

White does not entitle petitioner to habeas relief. As an initial matter, even if I were to conclude that the Kentucky Supreme Court's decision in this case was "contrary to" *White*, that case is not a Supreme Court precedent—thus, petitioner could still not establish that the Kentucky Supreme Court's decision was "contrary to [clearly established] federal law." *Bey*, 500 F.3d at 520; see also 28 U.S.C. § 2254(d)(1).

Regardless, *White* is distinguishable. Unlike petitioner, White raised a federal constitutional claim that is cognizable on habeas review—the ineffective assistance of counsel. Our review of petitioner's claim is far more circumscribed than was the Fifth Circuit's of White's claim. Because petitioner raises a due process claim, this court may only grant relief if the admission of the evidence of Warfield's pregnancy was "so prejudicial that it violated [petitioner's] right to a fundamentally fair trial." *Pudelski v. Wilson*, 576 F.3d 595, 613 (6th Cir.2009). Petitioner's trial was not fundamentally unfair. Unlike in White, the trial court in the instant case limited the references to Warfield's pregnancy, which was mentioned twice during a trial that lasted several weeks, and no reference was made to any harm suffered by the embryo.

Further, prosecutors presented substantial evidence of petitioner's guilt, which included—unlike in *White*—substantial evidence of his intent to commit

the crimes. Malone was stabbed nine times. The fatal wound was the one that punctured his heart. Warfield was strangled to death. Petitioner testified that when he arrived at the apartment he saw Malone "laying face down by the back door in a pool of blood" and that he did not know Warfield was there. However, expert testimony established that blood found on Warfield's thigh matched petitioner's DNA. According to petitioner, a masked assailant armed with a knife was the real killer, and petitioner fought with him at the apartment, suffering wounds on his hands and arms as a result. Petitioner testified that he did not go to the police due to his crack cocaine use. But, petitioner testified, following what he allegedly witnessed at the apartment, he bought band-aids, went to his mother's house, visited friends, bought beer, and visited other friends to smoke crack. "Intent to kill can be inferred from the extent and character of a victim's injuries," and "because a person is presumed to intend the logical and probable consequences of his conduct, a person's state of mind may be inferred from actions preceding and following the charged offense." *Hudson v. Commonwealth*, 979 S.W.2d 106, 110 (Ky.1998) (citation and quotation marks omitted). Here, the brutality of the injuries and Wheeler's conduct immediately after the crime, as well as his failure to truthfully answer police inquiries, constitute significant evidence of his guilt.

Additionally, petitioner notes that his case and one Kentucky Supreme Court Justice's dissent on the issue of Warfield's pregnancy in his direct appeal became a topic of discussion in the electoral race for the

Kentucky Supreme Court years after the issuance of the Kentucky Supreme Court's decision. This argument, perhaps obviously, is unpersuasive. Putting aside the fact that what happened in an election three years after petitioner's direct appeal has no bearing on what happened at his trial—and thus, could not have been a source of prejudice at that trial—this argument has nothing whatsoever to do with federal law.

In short, petitioner has failed to persuade me that the admission of evidence related to Warfield's pregnancy rendered his trial fundamentally unfair. Accordingly, no habeas relief is appropriate on this claim.

IV.

Next, petitioner argues that the trial court improperly admitted evidence as to the availability in the future of prison furloughs. Specifically, petitioner argues that, through this evidence, the jury was led to believe that "unless [it] imposed a sentence of death, [petitioner] might one day be released into the community on furloughs," which petitioner argues was "irrelevant speculation that unfairly tilted the evidence in favor of a death sentence in violation of [his] constitutional right to a reliable capital sentencing determination."

This court may only review claims that have not been procedurally defaulted.

> A habeas petitioner procedurally defaults a claim if: (1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default.

Guilmette v. Howes, 624 F.3d 286, 290 (6th Cir.2010) (citation and internal quotation marks omitted).

This claim is procedurally defaulted. Petitioner acknowledges that he failed to raise this claim on direct appeal, raising it for the first time in his state post-conviction proceeding. Thus, petitioner "fail[ed] to comply with [Kentucky's] procedural rule[,]" *id.*, namely that a post-conviction proceeding is not the place for a "convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by [the Kentucky Supreme Court]." *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky.1972). Consistent with this rule, on his state post-conviction appeal, the Kentucky Supreme Court "enforce[d] the rule[,]" *Guilmette*, 624 F.3d at 290, when it declined to review the merits of this claim. *Wheeler*, 2008 WL 5051579, at *9 ("If Appellant wanted to challenge the [furlough] evidence presented at trial, he should have done so in his direct appeal, not by means of a [post-conviction collateral proceeding]."). This is an independent and adequate state ground for denying review. *See Lucas v. O'Dea*,

179 F.3d 412, 418 (6th Cir.1999). Nor has petitioner demonstrated cause and prejudice to excuse this default. Although petitioner asserted in the district court that his direct-appeal counsel's failure to raise this issue amounted to cause and prejudice to excuse the default, he does not do so in this court. Accordingly, petitioner has abandoned his argument that cause and prejudice exist to overcome the procedural bar. *See Post*, 621 F.3d at 427.

V.

Petitioner next raises another claim related to evidence of furloughs. Specifically, he claims that his trial counsel was ineffective for introducing testimony that he had received furloughs during his previous incarceration. Petitioner argues that this testimony "suggest[ed] to the jury, and open[ed] the door for the jury to conclude [that] the defendant could receive a furlough during which he could commit another violent crime" and "opened the door for the prosecution to utilize the furlough evidence to prejudice the jury, to play up [petitioner's] violent criminal history and failure to learn a lesson in prison, and to let the jury know it was possible [petitioner] could receive a furlough if sentenced to less than death."

The general standards governing a claim of ineffective assistance of counsel are set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To demonstrate ineffective assistance of counsel, "[a] petitioner must show that counsel's performance was deficient, and

that the deficiency prejudiced the defense." *Wiggins*, 539 U.S. at 521, 123 S.Ct. 2527 (citing *Strickland*, 466 U.S. at 687).

> In the context of a death sentence, the question of prejudice turns on "whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would conclude that the balance of aggravating and mitigating circumstances did not warrant death."

Hill v. Mitchell, 400 F.3d 308, 314 (6th Cir.2005) (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland* 's deferential standard." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011). I conclude that petitioner has not shown that his counsel's conduct with regard to the furlough testimony was contrary to, or an unreasonable application of, *Strickland*.

At the penalty phase, petitioner's counsel introduced a variety of evidence intended to establish that petitioner had been a model prisoner during previous incarcerations, including evidence of furloughs. For example, petitioner's trial counsel introduced the testimony of Michael Cooper, an employee at the Luther Luckett Correctional Complex where petitioner had served a prior incarceration.

Cooper testified that petitioner worked for him as a janitor in the Property Room and exhibited a "good work ethic" and required "very, very little supervision." Cooper testified he was not aware of any disciplinary action ever being taken against petitioner. According to Cooper, petitioner received two furloughs while incarcerated. Cooper added that he did not know whether prisons still offered furloughs, but did know that none had been granted "for several years" and noted that such a grant was "extremely rare."

Petitioner's counsel also introduced the testimony of Robin Rawlings, who had recently worked as a Classification and Treatment Officer with the Department of Corrections and as a Probation and Parole Officer with the Commonwealth's Department of Justice. Rawlings testified that, as an inmate, petitioner worked as a janitor in the administration building, which included the offices for the prison warden and the deputy warden. Rawlings indicated that she spoke with petitioner every day, and she was not aware of any complaints, conflicts, or problems from either the staff or other inmates regarding him. Rawlings also worked with petitioner within a small group setting to assist inmates with their chemical dependency issues. Prison life is "very regulated and dictated by rules[,]" according to Rawlings, and petitioner was a "model inmate."

Rawlings was also queried about furloughs. To that end, Rawlings testified that, based on the policy in place at the time she was employed at the prison, she was "positive" that petitioner would not be eligible for

a furlough given his two murder convictions. On cross-examination, the prosecutor also asked Rawlings about furloughs:

> [PROSECUTOR]: Um, Ms. Rawlings, uh, as far as furloughs are concerned, there was a time when individuals who were convicted of murder were granted furloughs, is that correct?
>
> ROBIN RAWLINGS: Yes, sir, that's true.
>
> [PROSECUTOR]: Okay, and they changed the policy at some point, right?
>
> ROBIN RAWLINGS: Yes, they did.
>
> [PROSECUTOR]: Okay, and you can't, uh, tell this jury what the policy is going to be in the future, 20, 30 years? You don't know that, do you?
>
> ROBIN RAWLINGS: That's true, sir.
>
> [PROSECUTOR]: Okay, policies change?
>
> ROBIN RAWLINGS: Yes, they do.

The record indicates that, when introducing testimony about petitioner's prior furloughs, petitioner's trial counsel was attempting to obtain a sentence other than death for petitioner. For example, during closing arguments, petitioner's trial counsel stated:

> We're not saying that these people did not suffer or that their families do not continue to suffer. We are telling you that the death penalty is not your only option. If you find the mitigation, if you find any redeeming qualities, and there are some there, you should give him his life.

Testimony by Cooper and Rawlings showed that Wheeler worked well within the structured environment of prison during the time of his previous incarceration. Wheeler had already admitted to being a convicted felon during his guilt-phase testimony. At the penalty phase, the prosecution introduced evidence that petitioner pleaded guilty to ten counts of robbery on November 20, 1991, for which he was sentenced to twenty years of imprisonment, and that, later, on August 13, 1998, petitioner was convicted for illegal possession of a controlled substance (cocaine), for which he received a sentence of one year.

In the context of this record, petitioner's counsel argued that petitioner suffered from a drug addiction but could otherwise thrive within the structured environment of prison life:

> When you think of these offenses, I would think of someone who's been in trouble all their lives, who's never been responsible, who's never been stable, who could never hold a job, who could never find someone to love him or care about him. But that's not what we found here in the case of Roger Wheeler. We have found someone who has been, at one time, responsible and

> capable and stable and able to work and able to contribute, and I think he can still contribute in the penitentiary.

Based on this record, I conclude that petitioner is not entitled to relief on this claim. A petitioner has a constitutional right to present testimony during the penalty phase about his good behavior while incarcerated. *See Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). That is what petitioner's trial counsel did. The inclusion of the furlough testimony simply emphasized the benefit that petitioner derived from incarceration. It also showed the trust he had earned with prison officials. Moreover, our precedent buttresses my conclusion. In *Campbell v. Bradshaw*, 674 F.3d 578, 588 (6th Cir.2012), this court concluded that trial counsel was not ineffective for introducing the petitioner's entire incarceration record during the penalty phase of trial because it was "part of a strategic effort to be candid with the jury about Campbell's past in an effort to gain credibility and, ultimately, obtain a life sentence for Campbell." No prejudice resulted in that case because a mental health expert addressed the same information and the jury heard much of the negative information from other sources. *Id.* at 589. The same thing occurred here and thus the same result is warranted. Notwithstanding the furlough testimony, the jury was aware that petitioner had served only a fraction of his twenty-year sentence from his prior convictions.

VI.

Petitioner raises yet another ineffective assistance of counsel claim related to the furlough testimony. Specifically, petitioner argues that his counsel was constitutionally defective for failing to object when the prosecutor cross-examined Rawlings about the potential availability of future furloughs and when the prosecutor raised the furloughs issue in closing arguments. I disagree.

Initially, as for his claim regarding his counsel's failure to object at oral argument, petitioner has procedurally defaulted this claim. Petitioner did not raise this claim in state court. Under Kentucky's rules of criminal procedure, petitioner had three years "after the judgment [became] final" to raise this issue. *Roach v. Commonwealth*, 384 S.W.3d 131, 135 (Ky.2012). That time has now passed. Thus, petitioner has failed to comply with a state procedural rule, and that rule is an independent and adequate state ground for denying review of this claim. *See Guilmette*, 624 F.3d at 290; *see also Lucas*, 179 F.3d at 418. Accordingly, petitioner has procedurally defaulted this claim. *See Lovins v. Parker*, 712 F.3d 283, 293 (6th Cir.2013) ("[A] claim is procedurally defaulted where the petitioner failed to exhaust state court remedies, and the remedies are no longer available at the time the federal petition is filed because of a state procedural rule.").

Nor is habeas relief appropriate on petitioner's claim regarding his counsel's failure to object during Rawlings' cross-examination. This claim is not procedurally defaulted, as petitioner raised it in his state post-conviction relief proceedings. However,

petitioner cannot show deficient performance or prejudice arising from his trial counsel's failure to object to the prosecution's cross-examination of Rawlings. As the Kentucky Supreme Court noted, the information contained within that testimony was accurate and not misleading. *Wheeler*, 2008 WL 5051579, at *10. Petitioner's concern about the speculative nature of Rawlings' testimony is also unavailing. In *California v. Ramos*, 463 U.S. 992, 1004, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), the Supreme Court rejected a similar argument—that a jury should not be instructed that a governor has the power to commute a sentence of life without parole as speculative and misleading—because the instruction in question "gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence." The same is true here.

VII.

Petitioner also claims his counsel was ineffective for failing to: (1) elicit from petitioner that his shoe size was larger than that of the bloody footprint found at the crime scene by the police; (2) elicit from petitioner that he possessed the shoes that he wore on the night of the murders; and (3) retain a shoe expert. I address each part of this claim in turn, ultimately concluding that none entitles him to habeas relief.

Initially, I conclude that petitioner has procedurally defaulted his claim that his counsel

should have elicited testimony from him about his shoe size. Petitioner did not present this claim to the state courts and no state remedy now exists for doing so. *See Lovins*, 712 F.3d at 293; *Guilmette*, 624 F.3d at 290; *Lucas*, 179 F.3d at 418. And, petitioner does not attempt to show cause and prejudice to cure the default.

Nor is relief proper as to the other two parts of this claim. During his guilt-phase direct testimony, petitioner recounted the day of his arrest, indicating that he was wearing "shower shoes." The prosecutor then objected. At sidebar, the prosecutor noted that petitioner's trial counsel had indicated that they had a pair of petitioner's tennis shoes in their possession; the prosecutor objected to the admission of the shoes because no chain of custody had been established and the shoes had been unaccounted for since the day of petitioner's arrest, more than three years prior to trial. The trial court sustained the objection. Following the conclusion of petitioner's testimony, petitioner's trial counsel offered petitioner's testimony concerning the tennis shoes by avowal. Petitioner explained that he changed from flip-flops to tennis shoes when the police arrived at his mother's home to arrest him; the tennis shoes were located in his bedroom. Petitioner testified that the tennis shoes had been in his possession as part of his personal property at the jail for all that time.

Petitioner argues that his trial counsel's failure to ask Wheeler whether he wore the tennis shoes on the night of the murders resulted in prejudice because "[t]he jury had to decide whether to believe

[petitioner's] version of events surrounding the murders based solely on his testimony, which was inconsistent with what he told police in his pretrial statements," arguing that the admission of the shoes would have served as "concrete corroboration" of his testimony and "would have greatly enhanced his credibility." However, petitioner omits one critical point: without knowing Warfield's and Malone's shoe sizes to exclude the possibility that the bloody footprint belonged to one of them, he cannot demonstrate prejudice. And, as the magistrate judge and the district court noted, petitioner did not suffer prejudice given his lack of credibility because his "blood was found throughout the apartment including the very bedroom where [Warfield's] body was discovered. He repeatedly lied about his presence there to the police. He and his friend attempted to encourage perjury from another witness, Tracy Warrick, about the source of [petitioner's] knife wound on his left forearm."

As for petitioner's claim regarding his counsel's failure to call a shoe expert, I note that, in his state post-conviction proceeding, petitioner asserted that "[n]o expert testimony would be required for the jurors to compare the shoes with the shoe prints at the scene. A layperson could determine this fact." *Wheeler*, 2008 WL 5051579, at *6. The Kentucky Supreme Court considered this admission "tantamount to a concession that lack of an expert was not ineffective assistance." *Id.* I agree. Moreover, petitioner did not even make his own counsel aware of the alleged shoe size discrepancy until the middle of trial, when his trial counsel had no reasonable opportunity to retain such an expert on

short notice. In light of these facts, I cannot conclude that the Kentucky Supreme Court unreasonably applied *Strickland* by determining that petitioner was not prejudiced by the lack of a shoe expert.

VIII.

Next, petitioner claims his trial counsel was ineffective for failing to call a witness, Earl Ricketts, Jr., to contradict the testimony of a prosecution witness, Denise Mumpfort. I disagree.

Mumpfort was an employee of the B–Line convenience store in October 1997, near the apartment building where the murders occurred. She testified that she worked from 10 p.m. on October 1 to 6 a.m. the following day. Mumpfort testified that she knew who petitioner was "[b]y friends and coming in the store" on previous occasions. Addressing the night of the murders, the following exchange occurred between the prosecutor and Mumpfort:

> DENISE MUMPFORT: The night he came in the store, he came up to the counter, and I had asked him what had happened to him.
>
> [PROSECUTOR]: Why did you ask him that?
>
> DENISE MUMPFORT: Because he had blood on his head and had like finger cuts, looked like paper cuts on fingers.

ALEX DATHORNE: Okay, with blood on his head and finger—and cuts on his fingers?

DENISE MUMPFORT: Yes.

[PROSECUTOR]: Okay, and did he have any blood on his clothes?

DENISE MUMPFORT: Yes, on his jacket.

[PROSECUTOR]: And you asked him what had happened. What did he say?

DENISE MUMPFORT: He said his little girl hit him in the head with something.

Later, the two discussed the amount of blood that Mumpfort had observed on petitioner:

[PROSECUTOR]: Okay. Do you remember whether there was a lot of blood or a little bit of blood, or what was it, if you remember?

DENISE MUMPFORT: Hmm, it just looked like somebody just, you know, poured it on his head.

[PROSECUTOR]: So he had a lot of blood?

DENISE MUMPFORT: Sort of, on his head. Majority of it was on his head.

The police also interviewed Ricketts and prepared a report, which stated as follows:

> Upon meeting with Mr. Earl Ricketts Jr. at the above location, it should be noted that he is the security guard at this location. I showed Mr. Ricketts a photo pack and he was unable to positively ID anyone.
>
> He did state that a black male subject had come into the B–Line sometime after 1 a.m. on the night of the murders. He advised that this subject came in with blood on [the] right side of his neck and his hands. The subject told Mr. Ricketts that he was wrestling with his daughter and needed a band aid.

In support of his argument that his counsel should have called Ricketts, petitioner provides an affidavit from Douglas Blair, an investigator employed by the Department of Public Advocacy, who indicated that he had conducted a telephone interview with Ricketts, who told him that "Wheeler did not appear to have blood poured over his head" and that Wheeler "only had some blood on his collar and his hands."

Petitioner can demonstrate neither deficient performance nor prejudice as a result of his counsel's failure to call Ricketts. *See Otte v. Houk*, 654 F.3d 594, 601–02 (6th Cir.2011) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). As for *Strickland* 's deficient performance prong, petitioner argues that Ricketts' training as a security guard made him "uniquely credible" because he held a "position of trust" in comparison to Mumpfort. To this end, petitioner relies on *Workman v. Tate*, 957 F.2d 1339 (6th Cir.1992).

There, this court held that trial counsel was ineffective for failing to interview and present the testimony of the only two witnesses to an arrest who could have provided direct, contradictory evidence to that offered by the arresting police officers. *Id.* at 1345–46. Those are not the facts here. Ricketts' testimony would not have directly contradicted Mumpfort's in any material way. Both Ricketts' and Mumpfort's account of petitioner on the night of the murder involved the presence of blood on petitioner's person; the only disagreement between their accounts is the amount. The presence of blood, rather than the quantity of it, is the more important detail given petitioner's testimony that he fought the alleged assailant who was armed with a knife. Moreover, it is not a certainty that simply because Ricketts held a purported "position of trust" that the jury would have believed him and not Mumpfort. Thus, petitioner has failed to show that counsel was deficient for not calling Ricketts. As for *Strickland* 's prejudice prong, petitioner cannot demonstrate prejudice because—as discussed—there was substantial evidence of his guilt in any event. Accordingly, petitioner has failed to establish that his trial counsel's failure to call Ricketts resulted in a decision contrary to, or an unreasonable application of, *Strickland*.

IX.

Petitioner also challenges the penalty-phase jury instructions, alleging that they violated *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), by improperly instructing jurors that they

were required to be unanimous regarding the presence of mitigating factors. I disagree.

"The Constitution forbids imposition of the death penalty if the sentencing judge or jury is 'precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Henness v. Bagley*, 644 F.3d 308, 328 (6th Cir.2011) (quoting *Smith v. Spisak*, 558 U.S. 139, 130 S.Ct. 676, 681–82, 175 L.Ed.2d 595 (2010)). "A challenge to a jury instruction is not to be viewed in 'artificial isolation,' but rather must be considered within the context of the overall instructions and trial record as a whole." *Hanna v. Ishee*, 694 F.3d 596, 620–21 (6th Cir.2012) (citing *Estelle*, 502 U.S. at 72, 112 S.Ct. 475. "To warrant habeas relief, 'jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair. The burden is even greater than that to demonstrate plain error on appeal.' " *Buell v. Mitchell*, 274 F.3d 337, 355 (6th Cir.2001) (quoting *Scott v. Mitchell*, 209 F.3d 854, 882 (6th Cir.2000))).

Petitioner's claim lacks merit. Essentially, petitioner's argument is that because the jurors were instructed that their verdict had to be unanimous, but the trial court was silent in instructing them about unanimity as applied to mitigating factors, the jurors must have inferred that their mitigating-factor determination must also be unanimous. However, "[i]n this Circuit, failing to expressly state that mitigating

factors need not be unanimously found does not improperly imply that mitigating factors must be unanimously found." *Williams v. Anderson*, 460 F.3d 789, 808 n. 5 (6th Cir.2006). Here, the trial court used the word "unanimous" only once, to explain that the verdict must be so: "The verdict of the jury must be in writing, must be unanimous, and must be signed by one of you as Foreperson." The verdict form required only that the jury find an aggravating circumstance to recommend the death sentence. Requiring a unanimous verdict as to the sentence is not unconstitutional. *See Moore v. Mitchell*, 708 F.3d 760, 794 (6th Cir.), *cert. denied*, —— U.S. ——, 134 S.Ct. 693, 187 L.Ed.2d 559 (2013). Unlike in *Mills*, the jury instructions here did not, either explicitly or implicitly, require a unanimous finding of mitigating circumstances. Accordingly, the trial court's decision was not contrary to, or an unreasonable application of, *Mills*.

X.

Petitioner next claims that several statements by the prosecutor amounted to misconduct; he alleges that these statements denied him a fundamentally fair trial in violation of his constitutional due process rights. I disagree.

A petitioner faces a high bar when bringing claims of prosecutorial misconduct. "For the prosecutor's misconduct to violate the defendant's due process rights, it 'is not enough that the prosecutor's remarks were undesirable or even universally condemned';

instead those comments must 'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process.' " *Beuke v. Houk*, 537 F.3d 618, 646 (6th Cir.2008) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)). Indeed, "[t]he prosecution . . . has 'wide latitude' during closing argument to respond to the defense's strategies, evidence and arguments." *Bedford v. Collins*, 567 F.3d 225, 233 (6th Cir.2009) (quoting *United States v. Henry*, 545 F.3d 367, 377 (6th Cir.2008)). I conclude that this latitude was properly exercised here. Accordingly, petitioner has not established that the prosecutor's statements resulted in a denial of due process that was contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1); *Beuke*, 537 F.3d at 646.

Petitioner's first claim of prosecutorial misconduct involves the prosecutor's reference, during closing arguments, to the defense theory of the case as a "trick." The prosecutor stated: "So [defense counsel] gets up and said, 'Well, the shoeprint, that's the most telling of all.' Forget about all that DNA, forget about all the lies. It's called the defense trick. Look away, look away, look away. Don't look at the facts." Defense counsel objected, but the trial court overruled the objection because the prosecutor was merely "commenting [that] this is [petitioner's] theory of the case." I agree with the trial court—petitioner's counsel did rely on alleged inconsistencies in the shoeprint evidence. For example, petitioner's counsel argued that, because two shoeprints supposedly did not match, "[t]here were obviously two other people in that home"

when the murders occurred. Similarly, petitioner's counsel asserted: "There had to be more than one person. The shoeprint evidence tells you that. . .. Now if these shoeprints would have fit those of [petitioner's] you would have heard that evidence. Those aren't [petitioner's] shoeprints." Thus, it is clear that the prosecutor's argument was in response to petitioner's counsel's argument and was not improper. In any case, petitioner's claim in this regard does not show that he was denied due process. *Beuke*, 537 F.3d at 646.

Petitioner also claims that the prosecutor's closing argument was constitutionally improper because the prosecutor "fault[ed petitioner] for not presenting crucial evidence and implying the evidence was inculpatory even though the evidence was not presented solely because the prosecutor convinced the court to exclude it." Specifically, petitioner refers to the following portion of the prosecutor's closing argument.

> Shoeprint evidence: Ladies and gentlemen of the jury, this is why you find Roger Wheeler not guilty, because they found a shoeprint in this house. Hardwood floors, you got a shoeprint.
>
> But you know what? We need a shoe to compare it to. We don't have that. If you remember, he says, "I had gray Nike Airs or gray Nike tennis shoes, denim pants, and a black or dark sweatshirt on." He knows where his clothes are at. Mr. Cooperative never brought them in.

Petitioner's counsel objected, arguing that the prosecutor's comments shifted the burden to petitioner to show he was innocent. The trial court ordered the prosecutor to move on, but explained that "it's fair for [the prosecutor] to comment on the fact that [defense counsel has] focused greatly on the shoeprint" and noted that petitioner's counsel had already described petitioner as cooperative. As noted, petitioner's counsel did mention shoeprint evidence, thus opening the door for the prosecution to discuss that topic. Although petitioner's counsel did not specifically use the word "cooperative" to describe petitioner, petitioner was described as such in other terms. Petitioner's trial counsel, during closing argument, stated: "A guilty person would not have offered his own biological samples. [Petitioner] knew that he did not kill those people. [Petitioner] knew there was evidence of someone else, because he knew that someone else was there." The prosecutor's comments were not improper because they were made in response to petitioner's counsel's argument.

Next, petitioner claims that the prosecutor's argument was constitutionally improper because it "suggest[ed] the defense was responsible for a crucial witness[, Shannon Calloway,] not testifying, even though the prosecutor knew that witness had been killed before trial in an unrelated incident." During closing argument, the prosecutor argued:

> But then you start hearing about this Shannon Calloway fellow. Now what about Shannon Calloway? Let me ask you this, ladies and

> gentlemen of the jury. Aside from the interview that Detective Sherrard, uh, took from Shannon Calloway the day the bodies were discovered, when is the next time in this case you hear Shannon Calloway's name mentioned by this Defendant to any Detective in any statement? You don't hear about it until February of the year 2001. And you want to know what? It's kind of difficult in the middle of trial to stand up and run out and find people that the Defense wants us to get up and start pointing fingers at.

The record demonstrates, however, that petitioner's trial counsel referred to Calloway multiple times before the prosecutor did. Indeed, petitioner's trial counsel suggested that Calloway may have been the real murderer:

> There's Shannon Calloway there at the house with these two deceased individuals, and they [the police] don't even question or check his story out to see if he did, in fact, go over there. You, you heard Tiffany Malone say she's the one that called the police. We haven't heard any evidence that anyone else called the police. I submit that Shannon Calloway missed something the night before when he was at the apartment, and he went back there to finish what he missed.
>
> Maybe they should have checked Shannon Calloway's shoe size. Maybe they should have compared Shannon Calloway's shoes to what

> they've got here. I just don't see how, on October 3, that group of individuals that involved Shannon Calloway and some other people, how they would have known that Roger Wheeler had a stab mark on him unless they had done it, or one of them had done it.

Thus, it is clear from the record that the prosecutor's comments were made in response to petitioner's trial counsel's intimations that Calloway was the real murderer; accordingly, the prosecutor's comments were not improper.

Finally petitioner claims that the prosecutor made constitutionally impermissible statements when referring to petitioner's evidence of his struggles with substance abuse as "excuses" and when the prosecutor allegedly offered his personal opinion about the case. However, petitioner did not object to either of these statements at trial, as he was required to do to preserve the issue for appeal pursuant to Kentucky Rule of Criminal Procedure 9.22. Accordingly, these claims are procedurally defaulted, and petitioner does not allege cause or prejudice to cure the default. *See West v. Seabold*, 73 F.3d 81, 84 (6th Cir.1996) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87–88, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)).

For these reasons, petitioner is not entitled to habeas relief on his claims of prosecutorial misconduct.

XI.

Petitioner also claims that Kentucky's proportionality review violates the Eighth Amendment and denied him due process. Specifically, petitioner argues that Kentucky's proportionality review is unconstitutional because it incorporates cases in which the death sentence was not imposed and thus results in an arbitrary application of death sentences. I disagree. As this court previously explained in *Bowling*:

> The Supreme Court has held that the Constitution does require proportionality review, but that it only requires proportionality between the punishment and the crime, not between the punishment in this case and that exacted in other cases. *See Pulley v. Harris*, 465 U.S. 37, 50, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Although "[t]here is no federal constitutional requirement that a state appellate court conduct a comparative proportionality review," *McQueen v. Scroggy*, 99 F.3d 1302, 1333–34 (6th Cir.1996), *cert. denied*, 521 U.S. 1130, 117 S.Ct. 2536, 138 L.Ed.2d 1035 (1997), Kentucky law does require the Kentucky Supreme Court to engage in comparative proportionality review. *See* Ky. Rev.Code Ann. § 532.075(3)(c). Although claimed violations of state law are generally not cognizable on habeas, the Supreme Court has left room for the argument that a state-law error could, potentially, "be sufficiently egregious to amount to a denial of equal protection or of due process of law guaranteed by the Fourteenth Amendment." *Harris*, 465 U.S. at 41, 104 S.Ct. 871.

344 F.3d at 521. The *Bowling* court expressed skepticism over whether § 532.075(3)(c) created a due process interest, noting that "the statute only explains what the Kentucky Supreme Court needs to consider—similar cases, the crime, and the defendant—it does not tell that court how to make this decision. This suggests that no due-process right exists" pursuant to § 532.075(3)(c). *Id.* at 521–22.

Petitioner attempts to distinguish this case from *Bowling*, arguing that it "considered only a due process argument and merely noted that proportionality review is not required in light of *Harris* - but did not address what petitioner calls "threshold" statutes. According to petitioner, " *Gregg [v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976),] and [*Zant v.] Stephens*, [462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983),] require jurisdictions with 'threshold' statutes to consider in proportionality review cases where the death penalty was not imposed." Petitioner defines "threshold statutes" as akin to "Georgia's and Kentucky's statutes that permit juries to impose death as long as an aggravator is found and mitigation considered." The Supreme Court in *Harris*, however, saw things differently:

> While emphasizing the importance of mandatory appellate review under the Georgia statute, [*Stephens*], 103 S.Ct., at 2742, we did not hold that without comparative proportionality review the statute would be unconstitutional. To the contrary, we relied on the jury's finding of

> aggravating circumstances, not the State Supreme Court's finding of proportionality, as rationalizing the sentence. Thus, the emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances. Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required.
>
> There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Indeed, to so hold would effectively overrule *Jurek [v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976),] and would substantially depart from the sense of *Gregg* and *Proffitt [v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)]. We are not persuaded that the Eighth Amendment requires us to take that course.

465 U.S. at 50–51, 104 S.Ct. 871. Because petitioner offers no Supreme Court precedent supporting his notion that the Kentucky Supreme Court should have compared his case to cases in which the death penalty was not imposed, I conclude he is not entitled to relief on this claim.

XII.

Next, petitioner argues that his trial counsel was constitutionally ineffective for failing to explain the presence of petitioner's blood on Warfield's thigh and for failing to investigate the police's collection of this blood evidence. I disagree.

As an initial matter, petitioner cites neither any authority nor any portion of the record in support of his arguments regarding this claim. And, his argument is perfunctory in any event. Accordingly, petitioner has abandoned this claim on appeal. *See United States v. Villareal*, 491 F.3d 605, 611 (6th Cir.2007) (citing *United States v. Johnson*, 430 F.3d 383, 397 (6th Cir.2005)); *Gen. Star Nat'l Ins. Co.*, 289 F.3d at 441.

Moreover, even assuming that petitioner had not abandoned this claim, it is meritless. Again, in order to establish constitutionally ineffective assistance of counsel, a petitioner must demonstrate: (1) deficient performance by counsel—that is, that counsel's performance was objectively unreasonable under prevailing professional norms; and (2) prejudice to the defense as a result of that deficient performance. *See Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052. Professional norms, for purposes of the *Strickland* 's deficiency prong, are "judged by reference to the time of representation, and cannot be based on hindsight," and "[t]he burden lies with the petitioner to 'identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.' " *Storey v. Vasbinder*, 657 F.3d 372, 388 (6th Cir.2011) (quoting *Strickland*, 466 U.S. at 689, 690, 104 S.Ct. 2052). As for the prejudice requirement, a

petitioner can "show prejudice by establishing that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Davis v. Lafler*, 658 F.3d 525, 536 (6th Cir.2011) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). Along these lines, this court has previously noted that "[w]hen analyzing a *Strickland* claim under § 2254(d), our review is doubly deferential. The key question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Campbell*, 674 F.3d at 587 (internal citations and quotation marks omitted).

Petitioner suggests that "the drop of blood on Warfield's thigh is consistent with [petitioner's] blood having 'dropped' from the killer's knife—the same one used to stab Malone and [petitioner]—onto Warfield's thigh." As in the state courts, however, petitioner offers no support for this argument. This argument is entirely speculative. Petitioner points to no facts at trial that would support his theory that his blood was transferred by the real killer's knife and dropped on Warfield's thigh. And, even if that lack of evidence was the result of petitioner's trial counsel's failure to investigate, in light of the other overwhelming evidence of petitioner's guilt, I would still conclude that there was some "reasonable argument" that petitioner's trial counsel's strategy satisfied *Strickland*. Accordingly, even if he had not abandoned this claim, petitioner would not be entitled to habeas relief.

XIII.

Finally, petitioner argues that the trial court's failure to instruct the jury on voluntary intoxication and extreme emotional disturbance denied him a fundamentally fair trial and thus was contrary to, or an unreasonable application of, the Supreme Court's holding in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). I disagree.

"In capital cases, *Beck v. Alabama* requires that the jury be instructed on a noncapital lesser-included offense if, and only if, 'the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater.' " *Smith v. Bradshaw*, 591 F.3d 517, 523 (6th Cir.2010) (quoting *Beck*, 447 U.S. at 635, 100 S.Ct. 2382). In *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982), the Court explained that "due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." Here, the evidence does not warrant such an instruction. In support of this claim, petitioner offers only that "evidence throughout trial demonstrates [petitioner's] entitlement to an instruction on voluntary intoxication and extreme emotional disturbance (his actual drug abuse on the day of the offense, the nature of the crime, and his disheveled appearance following the crime)." However, "Kentucky law requires a 'triggering event,' that is responsible for causing the emotional disturbance." *Baze v. Parker*, 371 F.3d 310, 325 (6th Cir.2004) (quoting *Stanford v. Commonwealth*, 793 S.W.2d 112,

115 (Ky.1990)). "A triggering event is dramatic, creating a temporary emotional disturbance that overwhelms the defendant's judgment." *Id.* (citing *Spears v. Commonwealth*, 30 S.W.3d 152, 153, 155 (Ky.2000)). Petitioner has made no showing of a triggering event justifying an emotional disturbance instruction. The same is true concerning the voluntary intoxication instruction. "[A]n accused is entitled to have the defense of intoxication submitted in instructions to the jury if the evidence is sufficient to indicate that the degree of intoxication was at a level which prevented the forming of the intent necessary under the statute." *Foster v. Commonwealth*, 827 S.W.2d 670, 677 (Ky.1991) (citing *Parido v. Commonwealth*, 547 S.W.2d 125 (Ky.1977)). No such evidence was presented here. Presumably referring to the use of crack cocaine, petitioner only testified that, before the crime, he "was over to Donnie's, we, uh, we was using some then, and that's when we decided to get some—you know, try to obtain some more." This, without more, is insufficient to warrant relief.

XIV.

For these reasons, I conclude that petitioner is not entitled to relief on any of his claims and would affirm the district court in all respects. Accordingly, I respectfully dissent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NUMBER: 3:09CV-336-M

ROGER L. WHEELER PETITIONER

V.

THOMAS L. SIMPSON, WARDEN RESPONDENT

ORDER

The above matter having been referred to the United Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, objections having been filed, and the Court having considered the same and being sufficiently advised;

IT IS HEREBY ORDERED that the Petitioner's objections are **overruled** and the Court adopts the Findings of Fact and Conclusions of Law as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that the Respondent's motion for summary judgment is **granted** and Wheeler's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is **dismissed with prejudice**.

A Certificate of Appealability is **granted** as to grounds 1, 3, 5, 6, 7, 8, 10, 11, 14 and 15.

A Certificate of Appealability is **denied** as to grounds 2, 4, 9, 12, 13 and 16.

Joseph H. McKinley, Jr. Judge
United States District Court
March 2, 2011

Copies to: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NUMBER: 3:09CV-336-M

ROGER L. WHEELER PETITIONER

V.

THOMAS L. SIMPSON, WARDEN RESPONDENT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION.

(Relevant excerpt beginning on page 44 of the Findings of Fact, Conclusions of Law and Recommendation)

1. We begin out discussion with ground of Wheeler's habeas petition (DN 8 pp. 33-38). Wheeler maintains that four members of the jury pool were improperly excluded for cause contrary to *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) when the trial court struck them based on its belief that each of the four expressed views that would "prevent or substantially impair" them in the performance of their duties as jurors. The specific individuals, identified by number, include juror 638, juror 551, juror 625 and juror 602.

Juror 638 stated that he did not know if the state should have the authority to impose the death penalty

and was equivocal when asked whether he could consider the full range of penalties including the death penalty. (Citation to the record omitted.) Juror 638 agreed that he was not absolutely certain if he could realistically consider imposing the death penalty. (Citation to the record omitted.) He explained that with age he had become more contemplative on the issue of whether or not we have the right to take life.(Citation to the record omitted.) Initially, the trial court found that the juror remained capable of considering the entire penalty range, but reserved ruling on whether to strike the juror for cause. (Citation to the record omitted.) The following day, over the objection of the defense, the court struck juror 638 due to the court's view that the jury could not consider the entire range of penalties. (Citation to the record omitted.)

(Discussion of the three other jurors. Skipping to page 46 of the Findings of Fact.)

Wheeler insists that the actions of the trial court and the affirmation of such actions by the Kentucky Supreme Court are the result of an unreasonable application of *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) and *Witherspoon v. Illinois*, 391 U.S. 510 (1968). On direct appeal, the Supreme Court of Kentucky held the following as concerns Wheeler's jury qualification arguments:

> In this case, the trial judge allowed counsel for both parties great latitude in questioning the persons summoned for jury duty. The question

> of whether the potential jurors had any preconceived opinions that would interfere with their impartiality was carefully explored. The trial judge properly refused to strike for cause jurors who could consider the minimum penalty of twenty years. She appropriately struck for cause those jurors that could not impose the death penalty. She also correctly excused one juror who demonstrated a financial hardship. The voir dire process was entirely proper and thoroughly examined the question of whether any prospective jurors were predisposed. There was no error and the rights of the defendant to a fair trial by a fair and impartial jury, due process and freedom from cruel and unusual punishment under both the federal and state constitutions were not violated.

Wheeler I, 121 S.W.3d at 179.

The question this Court must now answer is whether the above legal reasoning is either contrary to, or an unreasonable application of, the clearly established precedent of the U.S. Supreme Court. Wheeler, as noted, insists that it is just that–an unreasonable application of *Witherspoon* and *Witt* because the equivocal responses of the four jurors did not establish that their individual views would prevent or substantially impair any of them in the performance of their respective duties as jurors based on the instructions and their individual oath. *Witt*, 469 U.S. at 424. Further, Wheeler insists that as to jurors 551 and 602 the refusal of the trial court to permit defense

counsel to further examine each juror unfairly precluded the defense from establishing their lack of bias against the death penalty.

These constitutional arguments must be examined in light of the then existing U.S. Supreme Court case law to evaluate the objective reasonableness of the Kentucky Supreme Court's decision. Prior to 1968, state law governed the question of whether potential jurors who expressed possible scruples against the death penalty should be excluded. *Williams v. Bagley*, 380 F.3d 923, 978, n. 1 (6th Cir. 2004), *cert. denied*, 544 U.S. 1003 (2005). In 1968, in *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), the Supreme Court established that those jurors who make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to the evidence, or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt, were subject to exclusion from the jury for cause. *Witherspoon*, 391 U.S. at 522, n. 21.

This rule established by *Witherspoon* subsequently was clarified by the U.S. Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 421 (1985). In *Witt*, the court held that

> the proper standard for determining when a prospective juror may be excluded for cause because of his or (sic) views on capital punishment...is whether the juror's views would prevent or substantially impair the

> performance of his duties as a juror in accordance with his instructions and his oath.

Witt, 469 U.S. at 424. The Supreme ourt (sic) continued to add that "this standard...does not require that a juror's bias be proved with 'unmistakable clarity' as such an exacting standard does not fit the realities of voir dire questioning." *Id.* at 424-25; *Beuke v. Houk*, 537 F.3d 618, 638 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 2792 (2009) (discussing *Witt*).

Further, the conclusion of a state court judge that a prospective capital sentencing juror should be excluded for cause due to his or her views on the death penalty is a finding of fact that is entitled to a presumption of correctness by the federal courts on habeas corpus review. *Witt*, 469 U.S. at 428-29. *See*, *Uttecht v. Brown*, 551 U.S. 1, 9, 17 (2007) ("Deference to the trial court is appropriate because it is in a position to access the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualification of potential jurors.") Indeed, the rebuttable presumption of correctness concerning the finding of a trial court that a juror was impartial was entitled to a presumption of correctness even before the passage of the AEDPA. *Bowling v. Parker*, 344 F.3d 487, 519 (6th Cir. 2003), *cert. denied*, 543 U.S. 842 (2004) (citing *Patton v. Yount*, 467 U.S. 1025, 1036 (1984) (Juror partiality is a question of historic fact)).

Finally, the focus of a reviewing court when examining the determination of the trial court in this regard is not "whether the trial judge was wrong or

right in his determination of impartiality, but merely whether his decision was fairly supported by the record." *Bowling*, 344 F.3d at 519 (citing *Witt*, 469 U.S. at 433). The *Uttecht* opinion holds in this regard that mere isolated statements of a potential juror that indicate an ability to impose the death penalty will not by themselves be sufficient to preclude the prosecution from striking such juror for cause when the responses of the juror, taken as a whole, indicate a lack of such an ability or the failure to comprehend the responsibilities of a juror. *Morales v. Mitchell*, 507 F.3d 916, 941-42 (6th Cir. 2007) (discussing *Uttecht*).

Here, an examination of the statements of the individual jurors now under review reveals that the decision of the Supreme Court of Kentucky reasonably applied these clearly established principles of *Witherspoon* and *Witt* to uphold the decision of the trial court to strike from the veniremen jurors 638, 551, 625 and 602 for cause. For example, juror 638 expressed uncertainty whether the state should even have the authority to impose a death penalty at all. Further, when directly asked by the prosecution whether he was not absolutely certain if he could realistically consider the death penalty or not, juror 638 replied, "I think that would be the most accurate way I could answer your question, sir." (Citation to the record omitted.) Juror 638 added during questioning by defense counsel that as he got older he had become more contemplative on the issue of "whether or not we have the right to take that life." (Citation to the record omitted.) Such comments reveal juror 638 to be substantially impaired based on his views on capital punishment in the

further performance of his duties as a juror contrary to the *Witt* standard. Accordingly, the trial court correctly found the juror to be biased.

(Discussion of the three other jurors. Skipping to page 50 of the Findings of Fact.)

Wheeler is correct that each of the four jurors made certain comments that taken in isolation suggest the abstract possibility that the specific juror involved might be able to consider the entire range of penalties. For example, juror 638, who questioned whether people have the right to take a life, did indicate that he could consider the entire range of penalties although he was not absolutely certain that he could realistically consider them. (Citation to the record omitted.) Also, the trial court did initially find that juror 638 could consider the entire penalty range, but reserved its ruling and the following day granted the motion to strike the juror for cause. (Citation to the record omitted.)

(Discussion of the three other jurors. Skipping to page 51 of the Findings of Fact.)

Wheeler insists that the above examples repeatedly show that the juror involved was not unequivocal in his or her opposition to the death penalty. That may well be so, but that is not the *Witt* standard, which looks to the entirety of the juror's responses to determine whether each juror could be substantially impaired in the performance of his or her duties as a result of that juror's views. The trial court,

with full knowledge of the demeanor and deportment of the jurors, determined that each one was sufficiently biased so as to be subject to disqualification from service for cause. The deference that determination, and the absence of any clear and convincing evidence by Wheeler that would compel this Court to set aside the findings of fact of the trial court, requires that the Court conclude that the decision of the Kentucky Supreme Court in this respect reasonably applied the clearly established precedent of *Witherspoon* and *Witt*.

*****

January 12, 2011

DAVE WHALIN, MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

RENDERED: AUGUST 21, 2003
MODIFIED: DECEMBER 18, 2003
TO BE PUBLISHED

Supreme Court of Kentucky

No. 2001-SC–0444-MR

ROGER LAMONT WHEELER APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HONORABLE ELIZABETH ABRAMSON
NO. 97-CR-2621 AND 97-CR-2768

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

AFFIRMING

Roger Lamont Wheeler was convicted by a jury of the intentional murders of Nigel Malone and Nairobi Warfield. The aggravating circumstance is that Wheeler's acts of killing were intentional and resulted in multiple deaths as described by KRS 532.025(2)(a)(6). Wheeler was sentenced to death on each conviction.

Wheeler raises 28 issues which we will discuss in the order in which they were presented in his original brief.

On October 2, 1997, Louisville police discovered the bodies of the victims in the apartment the victims shared. The male victim was found in a hallway near the bathroom. He had suffered nine stab wounds. Two stab wounds to the chest were considered the fatal wounds by the medical examiner. She described the crime scene as having blood spatters on the floor, walls, furniture and appliances. The medical examiner believed that the main struggle occurred in the kitchen and progressed to the hallway where the body of the male victim was found.

The female victim died as a result of manual strangulation. The medical examiner testified that she believed the struggle between the female and her assailant occurred in the bedroom where she was found. The female victim had multiple abrasions on the left side of her neck and lacerations with a bruise on her mouth and several bruises on her lips. Her body was found in a seated position, leaning against a bedroom wall. She was covered with a blanket or quilt and a scissors was protruding from her neck. The medical testimony determined that she had been stabbed with the scissors after she was already dead. During the autopsy, the medical examiner discovered that the female victim was pregnant.

There was blood on the floors and walls in nearly every room in the apartment. Numerous blood samples were also collected at the scene and were subject to laboratory testing. No fingerprints were found on the scissors.

Wheeler denied killing the two victims but he changed his story on several occasions. Originally, he denied ever being inside of the apartment on the night the murders occurred but then later admitted being in the apartment on that night. He claimed that Nigel Malone was already stabbed, but that he did not see Nairobi Warfield. He also asserts that the assailant was already inside the apartment and he and that person fought which was why he was wounded.

During the trial that began in February 2001, the trial judge instructed on one aggravating circumstance, intentional killings that resulted in multiple deaths. The trial judge also instructed on mitigating circumstances that Wheeler was under the influence of extreme emotional disturbance; that his capacity to appreciate the criminality of his actions or to conform his conduct to the requirements of the law was impaired as a result of intoxication and any other circumstances that the jury could consider as mitigating. We will now begin to consider the various arguments presented in the sequence provided by the brief of Wheeler.

I. Jury Challenges

Wheeler first argues that erroneous rulings on challenges for cause denied him the full use of his peremptory challenges. He exercised all nine of the allotted peremptory strikes.

The question of whether a juror should be excused for cause is a matter within the sound discretion of the

trial judge. *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871 (1993); *Alexander v. Commonwealth*, Ky., 862 S.W.2d 856 (1993), overruled on other grounds, *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883 (1997). Kentucky law requires that a jury must be fair and impartial and that the probability of bias or prejudice is a determinative factor in ruling on a challenge for cause. *Thompson, supra*; *Pennington v. Commonwealth*, Ky., 316 S.W.2d 221 (1958).

Mabe v. Commonwealth, Ky., 884 S.W.2d 668 (1994), determined that a "per se disqualification" is not required simply because a juror does not immediately understand and embrace every legal concept presented during the general voir dire examination. The true test is whether, "after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Mabe, supra*.

In this case, the trial judge allowed counsel for both parties great latitude in questioning the persons summoned for jury duty. The question of whether the potential jurors had any preconceived opinions that would interfere with their impartiality was carefully explored. The trial judge properly refused to strike for cause jurors who could consider the minimum penalty of twenty years. She appropriately struck for cause those jurors that could not impose the death penalty. She also correctly excused one juror who demonstrated a financial hardship. The voir dire process was entirely proper and thoroughly examined the question of whether any prospective jurors were predisposed.

There was no error and the rights of the defendant to a fair trial by a fair and impartial jury, due process and freedom from cruel and unusual punishment under both the federal and state constitutions were not violated.

II. Religious Beliefs of Prospective Jurors

Wheeler argues that it was prejudicial error to inquire into the religious beliefs of prospective jurors during individual voir dire and to excuse them from service or allow peremptory challenges to be used against them because of their religious beliefs. This issue is not properly preserved for appellate review and is raised as plain error as provided by RCr 10.26 and KRS 532.075(2). During the individual voir dire, the trial judge asked each juror several questions related to his or her religious beliefs. Not only did counsel for Wheeler not object to the line of questioning used by the trial judge of prospective jurors, but defense counsel participated in the development of the questions themselves. Decisions made during voir dire are generally regarded as trial strategy. *Hodge v. Commonwealth*, Ky., 17 S.W.3d 824, 837 (2000).

Pursuant to RCr 9.36(1), a prospective juror shall be excused as not qualified if there is reasonable ground to believe that the juror cannot render a fair and impartial verdict on the evidence. There was no error in the inquiry of the trial judge of prospective jurors if they held any moral, religious or spiritual beliefs that would interfere with their service on the

jury. There is no violation of any provision of either the federal or state constitutions.

III. Juror Excused During Trial

At the beginning of the third day of trial, Juror 537 informed the trial judge that her husband was approached that morning by a coworker, the defendant's wife, who engaged him in a conversation about the trial. The husband of the juror told her that he remembered Wheeler very well and that Wheeler had to be fired because he "stayed high on the job all the time." The juror also told the trial judge that family members of the victim kept staring at her when she would leave the courtroom. The trial judge struck the juror for cause because she had extrajudicial knowledge that the defendant was fired because he stayed high all the time. The question of whether a juror should be excused for cause is a matter within the sound discretion of the trial judge. *Thompson*; *Alexander*, *supra*. The right to an unbiased decision by an impartial jury in a criminal trial is a basic principle of due process. *Hodge v. Commonwealth*, Ky., 68 S.W.3d 338 (2001). There was no abuse of discretion.

IV Batson Question

Wheeler contends that the exercise of peremptory challenges against African–American jurors violated the standards provided in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Wheeler asserts that the reasons offered by the prosecution for exercising a peremptory strike against Juror 536 does

not withstand the close scrutiny of the *Batson* test. We disagree.

In exercising a peremptory challenge on Juror 536, the Commonwealth noted that she refused to state her opinion as to the death penalty, stating that she felt that her opinion was irrelevant. The Commonwealth further noted that the juror stated that she believed in redemption and salvation as opposed to fixing a punishment. A careful examination of the record indicates that the Commonwealth gave sufficient race-neutral explanations for the exercise of a peremptory challenge against African–American Juror 536. *See Woodall v. Commonwealth*, Ky., 63 S.W.3d 104 (2001). We find no error.

V. Death Penalty Qualification

At trial, defense counsel filed a motion to preclude the removal of jurors who were not death qualified, or in the alternative, the defense requested that separate juries be selected for the guilt and penalty phases of the trial and that only the sentencing jury be death qualified. The trial judge overruled the motion after a hearing. This Court and the United States Supreme Court have repeatedly rejected the argument that death qualification of a jury violates the constitutional rights of the defendant. *See Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *Brown v. Commonwealth*, Ky., 890 S.W.2d 286 (1994). There was no error.

VI. Commonwealth Opening Statement

Wheeler claims that the use of the words "slaughterhouse" and "gutted like a pig" by the prosecutor in the opening statement warranted a mistrial because they were inflammatory and calculated to unduly prejudice the jury. We disagree.

The trial judge properly overruled the motion for a mistrial. We have held previously that a trial judge is in the best position to evaluate the existence of undue prejudice and in this case, she determined there was no undue prejudice. *Cf. Wilson v. Commonwealth*, Ky., 836 S.W.2d 872 (1992), *cert. denied*, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993), *overruled on other grounds, St. Clair v. Roark*, Ky., 10 S.W.3d 482 (1999). Here, the comments of the prosecutor reflecting his opinion based on his view of the evidence were certainly colorful, but not improper. *Cf. Derossett v. Commonwealth*, Ky., 867 S.W.2d 195 (1993). Considering the general circumstances of this bloody crime, the words used by the prosecutor did not render the trial fundamentally unfair. *See Partin v. Commonwealth*, Ky., 918 S.W.2d 219 (1996).

Opening and closing statements are not evidence and wide latitude is allowed in both. *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987). Counsel may draw reasonable inferences from the evidence and propound their explanations of the evidence and why the evidence supports their particular theory of the case. *Tamme v. Commonwealth*, Ky., 973 S.W.2d 13

(1998), *cert. denied*, 525 U.S. 1153, 119 S.Ct. 1056, 143 L.Ed.2d 61 (1999).

VII. Pregnancy of the Female Victim

It was not prejudicial error to admit evidence that the female victim was pregnant at the time of her murder. The fact that the female victim was pregnant was only minimally presented during trial. It related to her physical condition and the jury was entitled to hear such evidence. This Court has previously stated that evidence about whom and what the victim was prior to death was properly admitted. *See Templeman v. Commonwealth*, Ky., 785 S.W.2d 259 (1990); *Campbell v. Commonwealth*, Ky., 788 S.W.2d 260 (1990); *McQueen v. Commonwealth*, Ky., 669 S.W.2d 519 (1984). The pregnancy of the female victim was not sensational or shocking or prejudicial or likely to induce any undue sympathy. The brief reference to her pregnancy was fair comment to explain her identity. It did not deprive Wheeler of a fair trial. *Cf. Bowling v. Commonwealth*, Ky., 942 S.W.2d 293 (1997).

Wheeler also argues that KRS 532.025 is unconstitutional as applied to him because the jury could have considered three deaths by including the unborn child in finding the aggravating circumstances supporting the death penalty. The indictment does not mention the death of an unborn child. The jury instructions directed the consideration of two deaths, that of the male and female victims. Wheeler was not denied a fair trial or due process of law under either the federal or state constitutions. The admission of

evidence relating to pregnancy was not fundamentally unfair. The probative value of the evidence was not substantially outweighed by the danger of undue prejudice. *See* KRE 403. The reference to pregnancy was not error. The statute is not unconstitutional.

VIII. Tennis Shoes

It was not error for the trial judge to exclude the introduction of Wheeler's tennis shoes as evidence. During trial, the defense filed a supplemental reciprocal discovery response and gave notice that it was in possession of a pair of gray Nike tennis shoes that may be introduced into evidence. The prosecution objected on grounds of inadequate notice and a lack of chain of custody which would indicate that the proffered shoes were in fact the same shoes that Wheeler was wearing three and a half years earlier. The trial judge sustained the objection.

On avowal, Wheeler testified that on the day of his arrest he was wearing flip-flops when the police entered his mother's home. The police officer told him to put on different shoes and he put on tennis shoes. He stated that those were the shoes he was wearing at the time of the arrest and they had been his personal property for three and a half years. The tennis shoes were also admitted pursuant to avowal. Wheeler contends that his rights were violated because the tennis shoes were crucial to the defense theory that someone else was in the house the night the two victims were slain.

The evidence was not relevant. According to Wheeler on appeal, the shoes would have supported his theory of the case if the prints from the excluded shoes did not match the numerous bloody shoe prints found at the crime scene. But this would be true if there was evidence to show that Wheeler was wearing the excluded shoes while he was in the apartment when the murders were committed. This he failed to do.

Wheeler admitted to being in the apartment on the night that the murders were committed. Thus, if he could show that the shoes he was wearing *while he was in the apartment at the crucial time* did not match the shoe prints found at the crime scene, the shoes would have tended to support his theory of the case. But Wheeler did not testify that he was wearing the shoes while he was in the apartment the night the victims were slain. Nor did the defense offer any other evidence to link the shoes to the crime scene. Rather, Wheeler testified on avowal that he was wearing the shoes when he was arrested the next day. The mere fact that Wheeler owned a pair of shoes that may or may not have matched the shoe prints found at the crime scene did not tend to make the defense theory more probable. They were not relevant. KRE 401. The trial judge made the right ruling for the wrong reason. *See Noel v. Commonwealth*, Ky., 76 S.W.3d 923, 929 (2002); *Tamme*, 973 S.W.2d at 31.

IX. Witness Credibility

The trial judge correctly denied the defense counsel the right to impeach a witness about her delay in

reporting knowledge about the crime. The witness was working as a clerk at B–Line Food Mart on the night of the crime when Wheeler entered the store covered with blood. The witness testified that she recognized him from the neighborhood and from his prior visits to the store. Wheeler himself when testifying at trial admitted that he went into the store after leaving the home of the murder victims. On cross-examination, defense counsel wanted to question the witness regarding why she did not report to the police Wheeler's appearance on the night of the murders. The defense sought to impeach the witness by revealing to the jury that she had a son who had been a victim in a later unrelated crime and that she was in court with her son on October 9, 1997, but she failed to mention Wheeler's appearance on the night of the murders.

The trial judge correctly sustained the prosecution's objection, stating that the line of questioning would be irrelevant, speculative and collateral and further that such questioning would create the impression that the witness was somehow involved with the murders or in trouble regarding a separate criminal matter. The trial judge did allow the defense to question the witness as to when she reported the incident to the police and what reason she had, if any, for the delay.

On avowal, the defense did question the witness about her involvement in the case in which her son was a victim. She also stated that in the present case she did not contact the police but that they contacted her and that she did not wish to testify for the

Commonwealth and was extremely reluctant to testify for either party. The evidence offered by the defense was not within the purview of KRE 608 as a proper attack on the credibility of a witness. The defense had full knowledge of her testimony in her son's case and the fact that her son was a victim of a crime was totally irrelevant. *Cf. Bowling, supra.*

X. No Improper Bolstering of Testimony

It was not error for the trial judge to allow the detective to explain his comments regarding the photo pack questioning by the defense. A police detective testified that the store clerk had identified Wheeler from a photo pack. When the prosecutor asked the detective if she had hesitated when she identified the photo, the defense objected on the grounds that such testimony was improper bolstering because the defense had not challenged the testimony about identifying the photo. Wheeler argues that any reference to the photo pack identification by the witness should have been excluded. We disagree.

The trial judge determined that the defense had opened the door to the issue of the presentation of the photo pack on cross-examination and that the prosecution was entitled to clarify the answers of the police detective on re-direct. Non-verbal conduct can be hearsay under the "implied assertion" rule. *See* Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.05 III(1), at 369 (3d ed. Michie 1993). The detective testified that the store clerk did not hesitate in her identification of Wheeler. This evidence of lack of

hesitation was offered as an implied insertion by the store clerk that she was positive of her identification. Thus, it was hearsay. However, it falls within the hearsay exception at KRE 801A(a)(3). *Owens v. Commonwealth*, Ky., 950 S.W.2d 837 (1997).

XI. Blood Spatter/Bite-mark Evidence

The trial judge properly determined that Dr. Amy Burrows qualified as an expert witness so as to permit her to testify about both blood spatter and bite-mark evidence. She testified that the injury to Wheeler's arm was not a bite mark. KRE 702 allows such evidence if it will assist the trier of fact in understanding the evidence and determining factual issues. The pathologist was properly qualified and an adequate foundation was presented to establish her expertise. The admission by Wheeler that he was not bitten, but was instead stabbed in the arm by the "unknown murderer," negates his argument as to the bite-mark evidence. The training of the pathologist and her on-the-scene observations clearly qualified her to testify about the evidence at the crime scene. The decision as to the qualifications of an expert is within the sound discretion of the trial judge and should not be disturbed in the absence of some abuse of discretion. *See Fugate v. Commonwealth*, Ky., 993 S.W.2d 931 (1999). *Cf. Mills v. Commonwealth*, Ky., 996 S.W.2d 473 (1999). There was no abuse of discretion.

XII. Crime Scene Video

There was no abuse of discretion by the trial judge in admitting the crime scene video into evidence. It was not cumulative. The trial judge did consider the objection by the defense but concluded that the 11–minute video was a more accurate depiction of the crime scene, showing the location and relationship of other evidence. In response to a motion by Wheeler for a new trial or judgment notwithstanding the verdict, the trial judge observed that she had exercised her discretion. Further, considering the size of the crime scene and the fact that there was blood everywhere, it was necessary to allow the use of the videotape to show the extent of the blood spattering and condition and placement of the victims. *Cf. McKinney v. Commonwealth*, Ky., 60 S.W.3d 499 (2001); *Cf.* Hodge v. Commonwealth, Ky., 17 S.W.3d 824 (2000). A careful examination of the record clearly shows that the photographs and the video were relevant for differing purposes and were not cumulative. There was no abuse of discretion.

XIII. Instructions

The instructions issued by the trial judge during the guilt phase were appropriate to advise the jury regarding the law to be applied in this case, and they comply with all federal constitutional standards.

The instructions tendered by Wheeler were properly refused. In *Grimes v. McAnulty*, Ky., 957 S.W.2d 223 (1997), we held:

> A defendant is entitled to have the jury instructed on the merits of any lawful defense which he or she has. However, the entitlement to an affirmative instruction is dependent upon the introduction of some evidence justifying a reasonable inference of the existence of a defense. (Internal citations omitted.)

The trial judge correctly found that no evidence had been introduced that the victims were the aggressors in the confrontation that led to their deaths. Wheeler had denied having anything to do with the murders. There was no evidence to support a self-protection instruction for the defendant. The trial judge properly found that the argument by the defense that two small cuts on Wheeler's right-hand knuckle were "defensive" wounds was not supported by the evidence. Even a preposterous defense must have some support in the evidence before it may be submitted to the jury. *Cf. Taylor v. Commonwealth*, Ky., 995 S.W.2d 355 (1999).

The trial judge properly overruled a request for an intoxication instruction because there was insufficient evidence to allow such an instruction. There was no testimony, even from Wheeler himself, that he was intoxicated at the time of the murders. There was no evidence or even an inference that Wheeler was so intoxicated that he could not conform his conduct to the law at the time of the murders. *Tamme*; *Cf.* 1 Cooper, *Kentucky Instructions to Juries* (Criminal) § 11.30 (4th ed.1993).

The trial judge was correct in denying the request by the defense for an instruction regarding extreme emotional disturbance. The trial judge correctly ruled that the defense theory was speculative because there was no evidence at trial that the male victim had refused to give Wheeler any drugs. It was Wheeler's testimony at trial that the drugs had been voluntarily given.

In order to use the EED instruction, there must be some definitive and nonspeculative evidence that the onset of the extreme emotional disturbance was caused by a triggering event. *Morgan v. Commonwealth*, Ky., 878 S.W.2d 18 (1994). Evidence of mere anger or hurt is not sufficient. *Talbott v. Commonwealth*, Ky., 968 S.W.2d 76 (1998). The refusal by the trial judge to give the instructions requested by Wheeler did not violate his right to a fair trial, due process and the right to present a defense under either the federal or state constitutions.

XIV. Defense Psychiatrist (EED)

The trial judge did not improperly limit the penalty phase testimony of a defense psychiatrist regarding extreme emotional distress at the time of the murders. On avowal, Dr. Meyers expressed the opinion that the offenses were committed while Wheeler was under EED at the height of his substance dependence on cocaine.

The trial judge properly limited the testimony of the defense psychiatrist as to the effects of substance

abuse. Further, she did not err in prohibiting testimony that there was EED in October 1997, or on the weighing of the mitigating and aggravating factors. Citing *Sanborn v. Commonwealth*, Ky., 892 S.W.2d 542 (1995), the trial judge correctly determined there was no evidence of a triggering event of any kind. Thereafter, the psychiatrist was permitted to testify. Among other things, he stated that chemical abuse was not an excuse and that he had only one contact with Wheeler. Following his testimony, the psychiatrist testified by avowal, stating that the mitigation outweighed the aggravating factors and that although not an excuse for the offenses, the crimes were committed while Wheeler was under EED caused by the dependency craving.

Evidence only of drug dependency is not sufficient to justify an instruction for EED. *Stopher v. Commonwealth*, Ky., 57 S.W.3d 787, 803 (2001); *Stanford v. Commonwealth*, Ky., 793 S.W.2d 112, 115 (1990). The limitation on the testimony of the defense psychiatrist did not violate Wheeler's right to present a defense, a fair trial, due process or to be free from cruel and unusual punishment under either the state or federal constitutions.

XV Preparation of Videotape Transcript.

Wheeler contends that the trial judge had authority to order preparation of transcript of evidence for appeal. He frames the issue as whether the trial judge has statutory authority to order the preparation of a transcript for use in a capital appeal. He asserts

that the trial judge could exercise her discretion to order the preparation of a transcript to be used for the preparation and presentation of the case on appeal.

We find this argument to be without merit. Although the trial judge would have discretion in ordering a transcript, we find it unnecessary that one be produced in this case. The use of videotaped records rather than the typewritten transcripts does not deny a defendant effective assistance of appellate counsel. *Marshall v. Commonwealth*, Ky., 60 S.W.3d 513 (2001). In fact, the use of the videotape could eliminate the possibility of errors in transcription and may in fact reveal errors that might be overlooked in a transcribed record. *Marshall, supra*. Wheeler has demonstrated no prejudice resulting to him from the use of a videotaped record without an additional typewritten transcript. He has been provided with a complete trial record pursuant to *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971). The use of a videotape record does not deny Wheeler due process.

XVI. Indictment/Aggravating Circumstance

The indictment was valid on its face and conformed to statutory requirements and the indictment in regard to aggravating circumstances was not defective. The indictment against Wheeler satisfied the requirements of RCr 6.10 because it informed him that he was charged with a violation of KRS 507.020, murder, and sets out the date, place and name of the victims he is charged with intentionally murdering. In *Wylie v. Commonwealth*, Ky., 556 S.W.2d 1 (1977), this Court

held that an indictment is sufficient if it informs the accused of the specific offense with which he is charged and does not mislead him. The citation by Wheeler to *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), which relates to federal prosecutions, is not contradictory to our RCr 6.10. *Jones, supra*, holds that the indictment should furnish the accused with a description of the charge which will enable him to make his defense. To the extent that Jones applies in any regard, due process has been fully satisfied here. Under any test, the indictment was sufficient.

KRS 532.025(1)(a) only requires the Commonwealth to notify the defendant of aggravating circumstances "prior to trial." *See Stopher, supra*, at 793. There is no authority supporting Wheeler's claim that an aggravating circumstance must be described in the indictment. The aggravating circumstance here was multiple deaths and he was indicted for killing two persons.

XVII. Mutually Supporting Aggravator/Double Jeopardy

Wheeler argues that the use of mutually supported aggravating circumstances violates the prohibition against double jeopardy contained in Section 13 of the Kentucky Constitution and the Fifth Amendment to the Federal Constitution. We disagree.

We decline to follow the theory presented by Wheeler of the Georgia principle of denying imposition

of multiple death sentences. The Georgia statute which is relied upon by Wheeler is different from the Kentucky statute.

This Court has previously considered this issue in *Bowling v. Commonwealth*, Ky., 873 S.W.2d 175 (1993) and *Tamme* and held that the multiple death restriction does not prohibit enhancement. Accord Jones. No error occurred.

XVIII. Second Murder as Substantive and Aggravating Factor

The use of another murder as a substantive crime and as an aggravating circumstance does not violate double jeopardy principles. Here, Wheeler was sentenced to death for the death of each of the two victims, aggravated by the fact that he also intentionally killed the other victim. *Tamme* held that the imposition of two death sentences by the application of the same aggravating factor, the intentional act of killing resulting in multiple deaths, did not violate any double jeopardy principle.

Reliance by Wheeler on the cases of *Heady v. Commonwealth*, Ky., 597 S.W.2d 613 (1980); *Boulder v. Commonwealth*, Ky., 610 S.W.2d 615 (1980) and *Dale v. Commonwealth*, Ky., 715 S.W.2d 227 (1986), is misplaced. To the extent they apply, these cases only limited the use of an offense to enhance one punishment and clearly relate to a status and not a crime. Each of these cases have been limited in their application. *See Jackson v. Commonwealth*, Ky., 650

S.W.2d 250 (1983) and *Eary v. Commonwealth*, Ky., 659 S.W.2d 198 (1983). There was no constitutional violation and no error occurred.

XIX. Lethal Injection

Wheeler argues that the death penalty is unconstitutional under the federal and Kentucky constitutions because the method used to carry out the sentence, lethal injection, is cruel and unusual punishment. Wheeler's claim that lethal injection is a violation of the Eighth Amendment against cruel and unusual punishment is without any case law support from Kentucky or elsewhere. It has been held in *People v. Stewart*, 121 Ill.2d 93, 117 Ill.Dec. 187, 520 N.E.2d 348 (1988), *cert. den.*, 488 U.S. 900, 109 S.Ct. 246, 102 L.Ed.2d 234 (1988), that medical experts urge that death by lethal injection is the most humane of any method of execution. Certainly, it is not cruel and unusual punishment. Death by electrocution also does not violate either federal or Kentucky law. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Wheeler has also failed to demonstrate that either method of execution conflicts with any societal norms.

XX. Discriminatory, Arbitrary or Disproportionate

Wheeler argues that the death penalty is discriminatory, arbitrary and disproportionate. We disagree.

Wheeler has not shown in his particular case that his death sentence is discriminatory, arbitrary or disproportionate. This Court and the United States Supreme Court have repeatedly rejected the statistical analysis presented by Wheeler as insufficient to invalidate a specific finding by a jury. *Woodall, supra*; *Bowling*.

XXI. Insufficient Statutory Guidance

There is sufficient statutory guidance for the imposition of the death penalty in Kentucky. Wheeler contends that KRS 532.025 is insufficient to provide constitutionally adequate guidance to juries who sentence in capital cases. This argument has previously been rejected by this Court. *See Bowling*.

XXII. Articulated Standard of Review

The trial judge properly imposed the sentence of death as fixed by the jury after a consideration of all the evidence. Wheeler complains that the role of the trial judge in sentencing is not clearly articulated and seeks to have *Bowling* overruled. We have previously considered and rejected this argument in Bowling and we find the argument to be without merit in this case.

Due process was not violated because the trial judge did have a separate and distinct role as contemplated by KRS 532.025 and KRS 532.030. *Matthews v. Commonwealth*, Ky., 709 S.W.2d 414 (1985). Wheeler was not denied due process or rational

sentencing. There was no violation of either the state or federal constitution.

XXIII. Proportionality

This Court has determined on many occasions that the proportionality review it conducts in conformity with KRS 532.075(3) is constitutional. *See Tamme.* Under all the circumstances of this case, the death sentence is entirely appropriate. The proportionality review conducted by this Court does not violate due process or equal protection.

Pursuant to KRS 532.075(3), we have reviewed the death sentence imposed herein and conclude that it was not imposed under the influence of passion, prejudice or any other arbitrary factor. There was ample evidence to support the finding of aggravating factors concerning which the jury was instructed. We have also reviewed all the cases decided since 1970 in which the death penalty was imposed. We have given particular attention to those in which the defendant was sentenced to death for multiple intentional murders. All of the cases reviewed have been previously cited by this Court in a number of decisions. *See Hodge v. Commonwealth*, Ky., 17 S.W.3d 824 (2000) and *Simmons v. Commonwealth*, Ky., 746 S.W.2d 393 (1988). The comprehensive lists which are provided in each of these opinions are incorporated herein by reference. We have also reviewed the cases of *Woodall v. Commonwealth*, Ky., 63 S.W.3d 104 (2001); *Stopher v. Commonwealth*, Ky., 57 S.W.3d 787 (2001); *Mills v. Commonwealth*, Ky., 996 S.W.2d 473 (1999);

Bussell v. Commonwealth, Ky., 882 S.W.2d 111 (1994); *Sanborn v. Commonwealth*, Ky., 892 S.W.2d 542 (1994); *Wilson v. Commonwealth*, Ky., 836 S.W.2d 872 (1992); *Taylor v. Commonwealth*, Ky., 821 S.W.2d 72 (1991); *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1991); *Epperson v. Commonwealth*, Ky., 809 S.W.2d 835 (1990); *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1988).

We have also considered whether the sentence of death is excessive or disproportionate to the penalty imposed in these cases as required by statute and have therefore considered all circumstances of the crime committed here and all of the evidence surrounding the defendant and his background. The information used in considering this penalty has been compiled in accordance with KRS 532.075(6)(a), (b) and (c). On the basis of this review, we have determined that the sentence of death in this case was not excessive or disproportionate to the penalties imposed in similar cases considering both the crimes and the defendants.

XXIV. Arbitrary or Disproportionate

The death sentence imposed on Wheeler was not arbitrarily or disproportionately applied in this case. There is no constitutional infirmity in the manner in which the proportionality review is conducted by this Court. *Bowling*. Here, the jury found the existence of an aggravating factor in each case, and death is the appropriate sentence. *See Smith v. Commonwealth*, Ky., 599 S.W.2d 900 (1980). A careful review of the record supports the ultimate jury decision. The jury

knew that Wheeler had been convicted of ten counts of first-degree robbery in 1991 and sentenced to 20 years in prison. In 1998, he was convicted of cocaine possession and sentenced to one year consecutive to the 20–year term. The jury also heard evidence of the good behavior of the accused while he was in prison. The weight to be given to any mitigating circumstances is within the sound discretion of the sentencing jury. Here, the death sentence is proper under the factual circumstances. *Cf. Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994).

XXV. Penalty Phase Instructions

Wheeler contends that the combined effect of penalty phase instructions 6 and 7 invade the province of the jury and creates a substantial possibility that the jury believed it should impose the death penalty.

The instructions in question do not violate the statutory system nor do they invade the province of the jury. The forms used follow those provided in 1 Cooper, *Kentucky Instructions to Juries* (Criminal) § 12.08 (4th ed.1999). These instructions did not coerce the jury into believing that it must impose the death penalty because they permit an option even when a finding is made on the aggravating circumstances. *Wilson, supra*; *McKinney, supra*.

No error occurred and there was no violation of either the federal or state constitution. The jury was not instructed that it needed a reasonable doubt to impose a death sentence.

XXVI. Defense Penalty Instructions

Wheeler argues that the penalty phase instructions denied him due process and a reliable capital sentencing. He claims 13 errors in support of his contention. Before the beginning of the penalty phase, both the prosecution and the defense tendered proposed jury instructions to the trial judge and a hearing was held. The tendered penalty phase instructions of Wheeler were not in conformity with the accepted standards of penalty phase instructions and were correctly refused by the trial judge. The claims of Wheeler have been previously rejected in other death penalty cases by this Court. *Foley v. Commonwealth*, Ky., 953 S.W.2d 924 (1997); *Mills, supra.*

There is no statutory requirement for a trial judge to instruct that findings on mitigating circumstances do not have to be unanimous nor is there a burden of proof requirement. *See Bowling.* The jury was instructed to consider nonstatutory mitigating factors but there is no requirement that the jury be instructed on specific nonstatutory mitigating circumstances. *See Sanders v. Commonwealth*, Ky., 801 S.W.2d 665 (1990). There is no requirement that the trial judge must give an instruction that the jury must conduct a balancing test between the aggravating and mitigating factors. *See Hodge, supra.*

There is also no statutory authority for separate instructions to the jury that if it did not find any of the mitigating circumstances to exist the jury still had the option of sentencing to something less than death. The

instructions in this case specifically permitted the jury to consider the entire range of penalties. There was no constitutional defect pursuant to either the federal or state constitutions.

XXVII. Verdict Forms

Wheeler argues that the verdict forms used were constitutionally flawed because they precluded consideration of a term of years or life in prison. He admits that the jury was informed by Instruction No. 6 that it did not have to sentence him to death, to life without parole for 25 years or life without parole even if it found the existence of the aggravating circumstance, multiple deaths. He contends that there is a substantial probability that such information was somehow misunderstood, lost or forgotten. We disagree.

The verdict forms did not in any way misinform or mislead the jury. They were correct. *See Mills*. The forms did not preclude the jury from consideration of a term of years or life imprisonment. There was no constitutional error of any kind.

XXVIII. Closing Argument

The closing argument by the prosecutor during both the guilt and penalty phases of the trial did not in any way deprive Wheeler of due process or a fair trial.

Wheeler presents a litany of complaints including the pregnancy of the female victim; the burden of proof;

the dead witness; the police examination of the automobile and the penalty phase arguments of the prosecutor. We find none of these contentions to have merit. The comments of the prosecutor were fair and at no time did the prosecutor inform the jury not to consider all evidence or all sentencing options. No manifest injustice resulted from the nature of any of these arguments. KRE 103(e); RCr 10.26.

When reviewing claims of error in closing argument, "the required analysis, by an appellate court, must focus on the overall fairness of the trial and not the culpability of the prosecutor. .. A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter, supra*, at 411–12. Reversal is only justified when the alleged prosecutorial misconduct is so serious as to render the trial fundamentally unfair. *Summitt v. Bordenkircher*, 608 F.2d 247 (6th Cir.1979); *Stopher*; *Partin, supra*. Here, the prosecutor did not go beyond the permissible boundaries of closing argument. There is no evidence of prosecutorial misconduct that would render the trial of Wheeler fundamentally unfair.

A careful review of the statements of the prosecutor in both the guilt and penalty phase of the trial did not render the entire trial unfair. He did not mislead the jury or mischaracterize or denigrate the mitigation. There was no cumulative error in this or any other part of the proceedings.

The judgment of conviction and the sentence are affirmed.

LAMBERT, C.J., COOPER, GRAVES and JOHNSTONE, JJ., concur.
KELLER, J., concurs by separate opinion.
STUMBO, J., dissents by separate opinion.
KELLER, Justice, concurring.

I vote to affirm Appellant's convictions and sentences, but I write separately as to Part VII ("Pregnancy of the Female Victim") because I disagree with the majority's suggestions that "the jury was entitled to hear such evidence,"1 that the evidence "was properly admitted,"2 and that the evidence was "fair comment to explain her identity."3 In fact, I agree wholeheartedly with Justice Stumbo's analysis and conclusion that this evidence was wholly irrelevant and therefore inadmissible. I nonetheless concur in the result reached by the majority opinion because I disagree with Justice Stumbo's conclusion as to the prejudice associated with the erroneous admission of this evidence. Instead, I agree with what the majority has to say in the first sentence in Part VII—"[i]t was not prejudicial error to admit evidence that the female victim was pregnant at the time of her murder."4 The brief reference to the victim's pregnancy was harmless in the context of this case and did not call the jury's verdicts into question or raise the inference that Appellant was deprived of his right to a fair trial.

Wheeler v. Commonwealth, Ky., op. at 181.

STUMBO, Justice, dissenting.

Respectfully, I must dissent from the majority's holding that the trial court did not err in allowing limited evidence that Nairobi Warfield was pregnant when she was murdered.

The fact that one of the two victims was pregnant did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Springer v. Commonwealth*, Ky., 998 S.W.2d 439, 449 (1999) (quoting KRE 401). KRE 402 provides that irrelevant evidence is inadmissible. Additionally, the underlying premise of KRE 403 is a balancing test between probative value and prejudicial effect. KRE 403 provides that relevant evidence may be excluded when the probative value is substantially outweighed by the prejudicial effect.

The parties agree that the introduction of evidence that Ms. Warfield was pregnant was mentioned briefly and without elaboration. In *Nugent v. Commonwealth*, Ky., 639 S.W.2d 761, 764 (1982), this Court observed "where the value of evidence for a legitimate purpose is slight and the jury's probable misuse of the evidence for an incompetent purpose is great, the evidence may be excluded altogether." If, as contended, the evidence was of minimal value to the Commonwealth's case, it is reasonable to infer that the mere reference to pregnancy would characterize Appellant as the murderer of a mother and her unborn child, and thus would have had an undue prejudicial effect.

The trial court reasoned that the evidence was admissible, as the pregnancy was a necessary part of explaining to the jury who Ms. Warfield was. I disagree. The facts sufficiently illustrated to the jury the brutality of the murders. The Commonwealth was required to prove that Appellant caused Ms. Warfield's death and no more. The fact that Ms. Warfield was pregnant had no bearing on meeting this burden.

Appellant argues, and I agree, that the probative value of the evidence of Ms. Warfield's pregnancy did not outweigh the potential for undue prejudice to Appellant. The evidence was irrelevant to the determination of Appellant's guilt, and was therefore inadmissible. Thus, the trial court erred by allowing limited evidence that Ms. Warfield was pregnant when she was murdered.

NOS. 97-CR-002621/ JEFFERSON CIRCUIT COURT
97-CR-002768

DIVISION THREE

COMMONWEALTH OF KENTUCKY PLAINTIFF

v. AMENDED JUDGMENT OF CONVICTION AND SENTENCE

ROGER LAMONT WHEELER DEFENDANT
404-02-2579
08/21/60

****

Representing the Commonwealth: Alex Dathorne and Dave Lewis

Representing the Defendant: Mike Bufkin and Sheila Seadler

At a Court held April 27, 2001;

This matter came before the Court for sentencing. The proceedings were recorded by videotape. (Videotape No. 30-3-2001 VCR-0014 A-14 & B-14.) The Defendant was before the Court on February 12, 2001 through March 5, 2001 for a trial by jury. On February 12, 2001 the parties announced ready. A jury panel was summoned, and the jury was duly selected and sworn. At the conclusion of all evidence, the Court instructed the jury; closing arguments by counsel were made; and the case was submitted to the jury.

Whereupon, the jury retired to the jury room for its deliberations. Having advised the Court that it had reached a verdict, the jury returned to the courtroom and returned the following verdict to wit;

JURY VERDICT ON INTENTIONAL MURDER (NIGEL MALONE)

Under Instruction No. 1 Intentional Murder (Nigel Malone):

We, the jury find the Defendant, Roger L. Wheeler guilty of Murder under Instruction No. 1.

Under Instruction No. 2 - Intentional Murder (Nairobi Warfield):

We, the jury find the Defendant Roger L. Wheeler guilty of Intentional Murder under Instruction No. 2.

The jury was polled. Whereupon, the Court accepted the verdict and the Court proceeded to the penalty phase wherein additional evidence was heard. The Court then instructed the jury on the penalty phase; arguments by counsel were made; and the sentencing was submitted to the jury. Whereupon the jury retired to the jury room for its deliberations. Having advised the court that it had reached a sentence, the jury returned to the courtroom and returned the following sentence, to wit:

Verdict From No. 3

> We, the jury find beyond a reasonable doubt that the following aggravating circumstance existed in this case:
>
> The Defendant's acts of killing were intentional and resulted in multiple deaths.
>
> and we fix the Defendant, Roger Wheeler's, punishment for the murder of Nigel Malone at Death.

Verdict Form No. 6:

> We, the jury, find beyond a reasonable doubt that the following aggravating circumstance existed in this case:
>
> The Defendant's acts of killing were intentional and resulted in multiple deaths.
>
> and we fix the Defendant, Roger Wheeler's, punishment for the Murder of Nairobi Warfield at Death.

A presentence investigation report was ordered and the Court reviewed the presentence report, a copy of which was provided to Defendant and his counsel for review and correction.

The Court having inquired of the Defendant and his counsel whether they had any legal cause to show

why judgment should not be pronounced against the Defendant, further, the Court having afforded the Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any information in mitigation of the punishment and no legal cause having been shown why judgment and sentence should not be pronounced against him, the Court, having due regard to the nature and circumstance of the crime, the history and character of the Defendant and the verdict of the jury, enters the following judgment.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant is sentenced as follows:

Intentional Murder (Nigel Malone) Death
Intentional Murder (Nairobi Warfield) Death

In so sentencing the Defendant, this Court finds that the sentences fixed by the jury for the Intentional Murders of Nigel Malone and Nairobi Warfield were not unduly harsh. The Court further finds that the Persistent Felony Offender (Second Degree) has been dismissed without prejudice by the Commonwealth.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant be remanded to the Jefferson County Jail, and that the State Department of Corrections (Luther Luckett Correctional Complex) shall deliver the Defendant to the custody of the Jefferson County Department of Corrections at his

earliest convenience. The State Department of Corrections (Luther Luckett Correctional Complex) shall transport the Defendant to the Kentucky State Penitentiary in Eddyville, Kentucky on May 2, 2001 for the purpose of execution of the sentence imposed upon him hereunder. Pursuant to RCr 11.04, execution is set for thirty (30) days after the conclusion of all state and federal appeals and review.

The Defendant is advised that he has a right to appeal. If he is unable to pay the cost of appeal, or employ counsel, the Court will appoint counsel, and will grant the Defendant the right to file his appeal in forma pauperis.

S/Lisabeth Hughes Abramson
LISABETH HUGHES ABRAMSON
JUDGE, JEFFERSON CIRCUIT COURT

MAY 1, 2001
DATE

COMMONWEALTH OF KENTUCKY

VS.

ROGER LAMONT WHEELER

JUROR 638

VR 6: 2/19/01: 14:41:54 - 14:56:57

VR 7: 2/20/01: 10:13:21 - 14:47; 10:16:06 - 59

Judge Abramson: Would you be able to consider the entire range of penalties, including 20 years imprisonment?

Juror 638: I believe I could. I've never been faced with that choice, but I believe I could.

Judge Abramson: Uh, most people haven't. Would you be able to consider the entire range of penalties, including the death penalty?

Juror 638: Probably with some deep reflection.
Judge Abramson: Okay, all right, and we're just we know these are hard questions. We're just looking for your best response.

Juror 638: Okay.

Judge Abramson: And we know that you haven't heard these questions before. Do you think the Commonwealth of Kentucky should have the authority to seek the death penalty in certain cases?

Juror 638: Um, I don't know.

Judge Abramson: All right.

Juror 638: I don't know.

Judge Abramson: What are your feelings and beliefs about the death penalty?

Juror 638: Um, obviously, it's been a very contemporary issue, and I've read and seen a lot about it. I'm not sure that I have formed an opinion one way or the other. I believe there are arguments on both sides of the - of it.

Judge Abramson: Okay. Have you ever discussed the death penalty with your family, friends or coworkers?

Juror 638: In a general sense.

Judge Abramson: Okay, and is there anything that stands out in your mind about those conversations?

Juror 638: Uh, no, ma'am.

Judge Abramson: All right. Do you have any moral, religious, spiritual or personal beliefs that would keep you from considering the death penalty?

Juror 638: I don't believe so. I there is some, but I don't think strong enough to, at this point, to form a solid opinion one way or the other.

Judge Abramson: All right. If you have a religious or spiritual affiliation, what is that group's position on the death penalty, if you know?

Juror 638: Um, I'm not sure it is, it is said.

Judge Abramson: Okay, uh

Juror 638: It is a topic of discussion.

Judge Abramson: All right, I'll skip the next, then, which is whether you agreed with your spiritual or religious group's position on the death penalty. Uh, do you have negative opinions about people of a race different than your own?

Juror 638: Uh, I try very hard not to.

Judge Abramson: Okay. Do you or members of your family have social or work relationships with people of a race different than your own?

Juror 638: Yes, we do.

Judge Abramson: Does your neighborhood include residents of a race different than your own?

Juror 638: Yes, small number, but yes.

Judge Abramson: Okay, have you had a negative experience with a person or persons of a different race?

Juror 638: No different than everyone.

Judge Abramson: Okay, all right. The question is just whether you've had an experience that continues to affect you when you deal with people of that same race.

Juror 638: No.

Judge Abramson: All right, do you think African Americans are treated unfairly in the criminal justice system?

Juror 638: Um, I don't know. I really don't.

Judge Abramson: Do you think an African American is more likely, less likely or just as likely as a person of another race to commit a violent crime?

Juror 638: No, I don't believe so.

Judge Abramson: Okay, well, it's kind of an awkward question. It's whether they're more likely, less likely, or just as likely as a person of another -

Juror 638: I think just as likely.

Judge Abramson: Do you think an African American is more likely, less likely or just as likely as the person of another race to receive the death penalty?

Juror 638: Just as likely.

Judge Abramson: Do you think an African American victim of crime is more likely, less likely or just as

likely as the person of another race to receive justice in the court system?

Juror 638: Just as likely I believe.

Judge Abramson: Okay, do you think you have any racial prejudices?

Juror 638: Um, I'm sure that I do, but I try to, uh, be aware of them. I work in a very large, diverse organization.

Judge Abramson: Okay.

Juror 638: And these are things we're mindful or and try to overcome.

Judge Abramson: Okay, do you think that you have, uh, any racial prejudices that would affect you if you were seated in a case where there are people of a different race?

Juror 638: No, I don't believe so.

Judge Abramson: All right, all right. Do you know anything about this case other than what you're heard in this courtroom?

Juror 638: No, ma'am.

Judge Abramson: Do you recall seeing anything on television, reading anything in the newspaper or hearing anything on the radio about this case?

Juror 638: No, I don't.

Judge Abramson: Do you have a mental or physical disability that would prevent you from serving as a juror?

Juror 638: No.

Judge Abramson: All right, for the Commonwealth.

Alex Dathorne: Thank you, Your Honor, may it please the Court, Alex Dathorne, one of the Prosecutors. How are you doing today?

Juror 638: Good, sir.

Alex Dathorne: Good. Um, I just want to touch briefly on, uh, some of the discussions you were having with Judge Abramson with respect to your philosophy and beliefs, un, in regard to death penalty. I think the point of the exercise, uh, in this portion of the procedure, uh, for yourself, um, assume for the purposes of argument that you were selected as a juror in this case. And, uh, you, uh, returned a criminal trials are broken up into two parts and in essence, the first part is called the guilt phase.

Juror 638: Um-hm [yes].

Alex Dathorne: So you would deliberate with your jurors, ascertain whether this individual or a individual was guilty or not guilty. If you found that individual guilty, then you would get to the second

stage, which is the penalty phase, and that's kind of what Judge Abramson was talking about when she gave you those penalty ranges.

Juror 638: Yes.

Alex Dathorne: Okay, assume further, just for the purposes of argument, that you were a juror who were selected in a given criminal case, and you determined that, uh, this individual was guilty of two homicides, two intentional murders. Um, the Judge, at that point, would give you the penalty range of 20 years all the way up to the death penalty and all the options in between. And I think the question is given, uh, your philosophy and your beliefs with respect to the death penalty and the penalty ranges and whatnot, do you, uh, feel as though you could realistically consider each penalty option before making a decision.

Juror 638: well, obviously, I've never been confronted with that situation in a, in a real-life sense of having to make that kind of determination.

Alex Dathorne: Sure.

Juror 638: So it's difficult for me to judge how I would I guess act, uh

Alex Dathorne: And I, and I want to clarify that. You know, obviously, I'm not - you don't know the facts and circumstances about this case.

Juror 638: Yes.

Alex Dathorne: Um, and, and I don't think anybody uh, the Judge I know wasn't, I'm not -

Juror 638: Yes.

Alex Dathorne: -um, asking you to commit and tell us, what penalty are you going to give here?

Juror 638: I understand.

Alex Dathorne: Uh, I think, uh, it's just whether - and, and, and if I understand you correctly, maybe you're, you're telling me that, at this point, you're not absolutely certain whether your could realistically consider it or not, because you

Juror 638: I think, I think that would be the most accurate way I could answer your question.

Alex Dathorne: Okay. All right, well, I thank you for honestly. I appreciate that. Thank you. No further questions.
Judge Abramson: All right, Mr. Bufkin.

Mr. Bufkin: Uh, thank you, Your Honor. Um, I take it from, from what you've said so far, sir, that, um the death penalty is not something you talk about every day.

Juror 638: No.

Mr. Bufkin: And, uh, this is probably the first time anybody has ever really asked you a lot of questions about it. Um, and it's, it's kind of hard to, um, to kind of get a really good picture in just a few minutes, uh, so I'd like you to kind of expand on something. Um, when you talked to the Judge in response to her question regarding your opinion about the death penalty, uh, you told the Judge that you were not sure you have formed an opinion. Can you tell me a little bit more about some of the things that have gone through your mind that you've thought about when, uh, when you have thought about the issue of the death penalty, some of the concerns of whatever it is you have thought about?

Juror 638: Yes, sir, I'll try and be concise, uh

Mr. Bufkin: Sure.

Juror 638: on a very philosophical topic, I think a very difficult one. Um, the older I get, uh, perhaps the more I understand, uh, a lot more things about values and, life itself. I have four children, and those things are important to me. So, uh, perhaps I'm a bit more contemplative on the issue of taking a life and, uh, whether or not we have the right to take that life.

Mr. Bufkin: Okay. Um, and I think it's , it's, it's obvious to you at this point that nobody is asking what your decision would be.

Juror 638: Yes, sir.

Mr. Bufkin: It's just a question of whether you can consider it.

Juror 638: No, it's very clear. I understand the (inaudible).

Mr. Bufkin: And you do feel that you can consider all fo the options presented?

Juror 638: I believe I can, sir.

Mr. Bufkin: Very good. Thank you very much, sir. Judge, I have no other questions.

Judge Abramson: All right, thank you, Mr. [Kovatch], for coming in and answering our questions. Uh, you are excused until 9:00 tomorrow. There is a reminder here.

Juror 638: All right.

Judge Abramson: And we'll ask you - watch your step there; there's a drop-off to be back outside at 9:00, and the group will be assembled and brought in together.

Juror 638: All right.
Judge Abramson: Thank you for coming in and for answering our questions.

Juror 638: You're quite welcome.

Alex Dathorne: Your Honor, if I may?

Judge Abramson: You may.

Alex Dathorne: Uh, I would make a motion at this point to excuse Mr. Kovatch, Juror #638 for cause. Um, I think that, uh, in essence, he's given two inconsistent answers, and he answered my question by saying the most accurate way to describe his philosophy was, quote, he could not say whether he could realistically consider the death penalty or not. Uh, and I believe the Gall case is directly on point where a juror who can't say if he can give the death penalty can be stricken for cause, which in essence, at that point, leaves it in the Court's discretion.

Uh, in the response to the tail-end of Mr. Bufkin's questioning, uh, he did say, "Yeah, I can consider all the penalties," so I think you have two inconsistent answers. And, at that point, what I'm asking the Court to do is look at the totality of his, of his testimony. Um, he, uh, he seems to be a person who, uh, even though he states he hasn't formed an opinion, uh, he doesn't seem to be a person that, uh, I think, given the, the gravamen of his testimony, that he would be able to consider the death, the death penalty as a realistic consideration with respect to the penalty option. Um, and based on the totality of his, of his testimony that he provided and a very clear answer to my question, I would ask that this Court strike him for causes.

Mr. Bufkin: Uh, may I, Your Honor? Uh, I would agree with, with Mr. Dathorne at least insofar as that the Court should take into consideration the totality of his answers. Uh, I think it was, first of all, in regard to the

question that Mr. Dathorne asked, uh, I think it needs to be put into context in terms of the things that he prefaced his questions - his answers with. Uh, he was trying to be, and said several times in response to your questions and Mr. Dathorne's questions that, clearly, he was being faced with something he'd never faced before and that it was, was clearly new to him, and that made it difficult to predict his own behavior.

However, uh, he did clearly answer your question, uh, your questioning f him as to being able to consider all of it. Uh, he answered, uh, Mr. Dathorne's initial, initial questioning in regard to whether he could consider all options also again in the positive that he could do that. He answered my questions in regard to whether he could consider the full range again in the positive, that he could do that.

Uh, I think it is very clear that this is a man who has contemplated this issue and that now being confronted with it, uh, he wants to be, uh, very honest and candid with the Court and with us to tell us that I think, as some other jurors we've had in here, he has some reservations about thee death penalty, and as he's gotten older, he's become more contemplative about it. And I don't think there's anything in the case law that says that an individual is not qualified to sit as a juror because they, they, they question some aspects of the death penalty or they consider it to be a serious matter, or they consider it to be something that, uh, calls into questions, uh, issues of, of life and how important life is.

Um, he talked about this in terms of how he got as he got older and has a had, had children, he has thought more about things such as the value of human life. And I don't think it's at all - inappropriate at all in a death penalty case to have an individual back there in the jury room who believes that life is extraordinarily important and would have to think very carefully before he made a decision to impose the death penalty.

Uh, I think in the totality of his answers, clearly we've got an individual who has some reservations about the death penalty, but also I thought he was very clear in his answers that he would consider them all. There was that one question that Mr. Dathorne asked that I think may Mr. Dathorne has tried to put it as representing some ambiguity, but I think put in the context of that questioning and his, uh, beliefs that, you know, have caused him to make to raise some questions in his own mind and the fact that he repeated that he had never faced this kind of position before, so it was difficult.

I have no doubt that this gentleman, if he's in the jury room, will find it to be a difficult question, uh, to answer and a difficult issue to wrestle with, but that doesn't preclude him from, from service on this jury. And I think he is definitely qualified to sit, Your Honor.

Judge Abramson: Okay. Well, um, my overall sense was that he was, uh, someone who would take this job very seriously and who had serious reservations about the death penalty, but his responses to my questions

were not at all indicative of someone - un, in fact, what I do mean when I finish my, my questioning is, is, first of all, put down "could consider entire range: or "exhibits reluctance on death penalty" or "exhibits reluctance on 20 years" or "can't consider" - I do sort of a summary. Uh, and I put "could consider entire range." I mean, I didn't even see him as problematic when I got through with him. Um, I think if you look at the totality of the questioning, what he's indicating, uh, that I understood was that he would take it very seriously but that he could consider the entire range. Um, and I guess and, maybe I just didn't hear it phrased the, the way that your phrased it but, um, I didn't hear him say that he couldn't realistically consider the death penalty. Did he actually say that?

Alex Dathorne: He said that, Judge. And, unfortunately when Mr. Bufkin came back, he didn't use that particular word and, I mean, that's the word we've been using throughout these proceedings that kind of -

Judge Abramson: Yeah.

Mr. Bufkin: I, I put in, I put in quotes. I mean, I, I, I think given the totality, it probably wouldn't make a difference if he answered that one question to me but, um, he did say -

Judge Abramson: Okay, let me just reserve and and, let me just go back - I'm going to go back and watch his whole his whole -

Mr. Bufkin: (Inaudible/mixed voices).

Judge Abramson: um, because I really didn't catch that.

Mr. Bufkin: Fair enough. Thank you, Your Honor.

Judge Abramson: Yeah, let me reserve on that.

(End of VR6 excerpt) * * * * *

Judge Abramson: Uh, the very first thing that I'm going to do is call in the five jurors who, um, don't know, uh, that have been excused and, uh, let me just, uh, state on the record this morning that I did review {Gail Turner}, #585. There was a motion to strike for cause on behalf of the, uh, Defendant, and when I reviewed her testimony, she did say, uh, that she could not consider the low end of the range for a double homicide. So that's Gail Turner. She, uh, will be stricken for cause.

Also Mr. Kovatch, who we had yesterday, um, can't remember his juror badge number, just a second here, uh here we go, Mr. Kovatch is #638. Uh, the Commonwealth moved to strike Mr. Kovatch, uh, because of his expressed, uh concerns about considering the entire range. And when I went back and reviewed his entire testimony, Mr. Dathorne concluded with saying, "Would it be accurate to say that you couldn't, couldn't consider the entire range?" And his response is I think was, "I think that would

be pretty accurate." So, I'm going to sustain that one, too. So that's 638 and 585 that are gone for cause.

(End of VR 7, Excerpt 1) * * * * *